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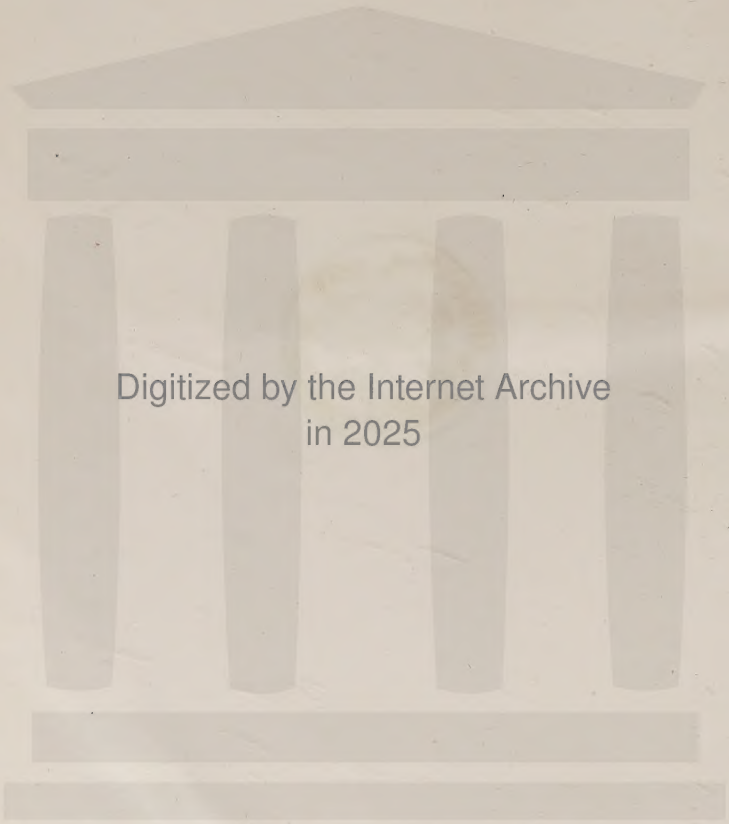
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BYTHEWOOD & JARMAN'S

CONVEYANCING.

FOURTH EDITION.

Vol. II.

APPOINTMENT OF NEW TRUSTEES—INDEMNITY.

BYTHEWOOD & JARMAN'S

SYSTEM OF CONVEYANCING.

A SELECTION OF

PRECEDENTS IN CONVEYANCING

TAKEN FROM MODERN MANUSCRIPT COLLECTIONS
AND DRAFTS OF ACTUAL PRACTICE

WITH

Dissertations and Practical Notes

BY THE LATE

W. M. BYTHEWOOD, THOMAS JARMAN & GEORGE SWEET,

BARRISTERS-AT-LAW.

Fourth Edition

BY

LEOPOLD GEORGE GORDON ROBBINS,

OF LINCOLN'S INN, BARRISTER-AT-LAW.

VOL. II.

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PREFACE

TO THE

SECOND VOLUME OF THE FOURTH EDITION.

THE considerable amount of entirely new matter contained in the present Volume has caused greater delay in its completion than was anticipated. The greater part of the Third Volume, which will treat of Leases, Licenses, Mortgages, and some minor matters, is, however, nearly ready for press, and the remaining Volumes will be brought out in rapid succession.

Four fresh subjects have been introduced in the present Volume, viz., Apprenticeship, Composition, Enfranchisement (*a*), and Enlargement of Long Terms.

(*a*) A Bill "to amend the Copyhold Acts, and to provide for the general Enfranchisement of Lands of Copyhold and Customary Tenure, and of Lands subject to certain Customary and other Rights and incidents," has been introduced in the House of Commons by Messrs. Waugh, G. Howard, S. Howard, Ainsworth, and Ferguson, with the object of providing for the general enfranchisement of lands of copyhold and customary tenure, &c., and to afford better facilities for enfranchising the same. The Bill, in its present form, provides for the compulsory enfranchisement of all unenfranchised copyhold and customary lands upon the first admission or enrolment of a tenant after a specified date; but the powers and *modus operandi* of the Land Commissioners in effecting the enfranchisement do not appear to be materially affected, and the power of voluntary enfranchisement by deed is expressly saved.

All the Dissertations have been carefully revised, and some have been almost entirely re-written. Conditions of Sale, which were in the last Edition discussed partly in the Ninth Volume under the head of Purchases, and partly in Mr. G. Sweet's Supplement to that Edition, are here separately treated. The Dissertation on this subject has been contributed, with the incorporation of such of the observations thereon of Mr. Jarman and Mr. Sweet as are now applicable, by Mr. Richard Booth, of Lincoln's Inn, to whom the Editor is also indebted for revising the sheets for the press and other valuable assistance.

The Editor has been greatly encouraged in the prosecution of his arduous and laborious undertaking by the kindness and courtesy which he has met with from members of both branches of the Legal Profession, who have liberally placed manuscript precedents and other materials at his disposal, and who have given him verbally or by letter valuable suggestions and advice. His acknowledgments are also due in respect of the information and assistance which has been readily given to him at the offices of the Land Commissioners for England and the Ecclesiastical Commissioners with regard to the practice of those Departments as regards Enfranchisements, &c.

L. G. GORDON ROBBINS.

4, Stone Buildings, Lincoln's Inn,
24*th March*, 1885.

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ADDENDA ET CORRIGENDA.

Page 16, line 39. *Appointment of New Trustees.*—Where there is a continuing trust the Court will not, under sect. 32 of the Trustee Act, 1850, simply remove or discharge a trustee without appointing a new trustee, even though the continuing trust affects only a small part of the property: *Re Lamb's Trusts*, 28 Ch. D. 77.

,, 22, two lines from foot, *after* "*Re Parrott*, 30 W. R. 97," *add* "*Re Lightbody*, 33 W. R. 452."

,, 33, line 12. *Appointment of New Trustees—Vesting Order—Joint Trustee out of Jurisdiction.*—The power of the Court to make a vesting order under sect. 10 of the Trustee Act, 1850, is not limited strictly to a legal joint tenancy, but includes the use of land vested in coparceners, one of whom is out of the jurisdiction: *Re Greenwood's Trusts*, 27 Ch. D. 359.

,, 49, margin, *for* "Continuing trustees release," *substitute* "Continuing trustees convey."

,, 76, line 35, *for* "16 & 17 Vict. c. 104," *substitute* "16 & 17 Vict. c. 107."

,, 100, line 2. *Reference of Action—Receiver.*—An action may be referred under sect. 11 of the C. L. P. Act, 1854, notwithstanding that cause can be shown for the appointment of a receiver in the action: *Compagnie du Senegal* v. *Smith*, 49 L. T. 527.

,, 147, line 31. *Enlargement of Time for making Award.*—Where a submission in writing fixed a time for making the award, but contained no power to enlarge the time, it was held that the Court had power to enlarge the time under sect. 15 of the C. L. P. Act, 1854 (stated at p. 145): *Re May and Harcourt*, 13 Q. B. D. 688.

,, 176, line 32, *for* "p. 70," *substitute* "p. 170."

,, 177, line 7. *Costs of Arbitrators—Taxation.*—It has been decided in a recent case that the Court has no power to compel an arbitrator to submit his costs to taxation: *Withington* v. *Wrexham Water Co.*, 32 W. R. 1000.

,, 208, line 32, *for* "if they should all take," *substitute* "if they should not all take."

,, 209, note (*l*), *for* "and see p. 130," *substitute* "but see p. 120."

,, 211, line 4, *for* "1854," *substitute* "1845."

,, 253, note (*a*), *for* "41 & 42 Vict. c. 31, s. 10," *substitute* "45 & 46 Vict. c. 43, s. 10," *and after the words* "Common Law Procedure Act, 1854," *add* "s. 26."

,, 292, margin, *for* "Payment on release," *substitute* "Payment or release."

,, 309, note (*a*), *for* "25 Geo. 2, c. 77," *substitute* "25 Geo. 3, c. 77."

,, 326, last line but three. *Immoral Consideration—Future Cohabitation*—The mere fact of continuance of cohabitation after a bond has been given to a mistress will not raise a presumption that the bond was given in consideration of future cohabitation: *Vallance* v. *Blagden*, 26 Ch. D. 353.

,, 446, note (*y*), *for* "compounding or arranging debtor," *substitute* "bankrupt."

,, 532, line 12, *for* "Moneys renewed," *substitute* "Moneys received."

MIDDLE TEMPLE

Jarman and Bythewood's

PRECEDENTS IN CONVEYANCING

APPOINTMENT OF NEW TRUSTEES.

PRELIMINARY DISSERTATION.

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Retirement of Trustees.

If a trustee who has not duly divested himself of that character, transfers the trust property to another person, the effect is, that though the property changes hands the trust does not; for the office, with all its powers and responsibilities, still resides in the person nominated by the author of the trust (*a*). A trustee who transfers the estate to his co-trustee intending to retire from the trust, but without having effectually discharged himself therefrom, is responsible for all the consequences of this act; and, therefore, if his co-trustee, who is thus invested with the sole power over the trust property, abuses that power by dealing improperly with the funds, the trustee who has enabled him to do so is answerable:

(*a*) Of course a person taking the trust property with notice becomes a *quasi* trustee, and liable accordingly.

Retirement of Trustees by Consent.

Wilkinson v. *Parry*, 4 Russ. 272; see also *Chalmer* v. *Bradley*, 1 J. & W. 68; *Hulme* v. *Hulme*, 2 My. & K. 682.

A trustee wishing to retire can divest himself of his office in one of three ways; (i) by obtaining the consent of all the persons interested; (ii) by virtue of a power expressed, or implied by law in the instrument creating the trust; or (iii) by obtaining his discharge by means of an application to the Court.

By consent,

Retirement of a Trustee by Consent.]—Where a trustee relinquishes his office by consent, it is necessary that *all* the beneficiaries should concur for the purpose of giving such consent. Even where the *cestuis que trust* are a numerous class of persons, such as creditors, it is not competent for the majority to consent against individuals, however few in number: *Sir George Colebrooke's case*, cit. 6 Ves. 622. If, therefore, any of the beneficiaries are not *sui juris*, or not in existence, the trustee cannot obtain an effectual and complete discharge. *Femes covertes*, unless restrained from anticipation, are considered as *sui juris* with respect to their separate property, and are also competent, with the concurrence of their husbands, to dispose of their real property and reversionary interests in personalty, not being their separate property, by deed acknowledged with the concurrence of their husbands. *Vide ante*, Vol. I., p. 210, tit. ACKNOWLEDGMENT.

under powers in settlements, &c.

Retirement of a Trustee under Powers in Settlement.]—Formerly, every well-drawn deed of settlement and will creating trusts contained provisions enabling the trustees to resign their office, and powers for supplying by a fresh nomination the vacancies occasioned by resignation, death, or otherwise. But the statutory enactments hereafter set out and considered render the insertion of such powers and provisions no longer necessary in ordinary cases.

Mode of framing powers.

The modes of limiting such powers in instruments creating trusts were various; sometimes they were vested in the continuing trustee or trustees alone; sometimes in the continuing and retiring trustees jointly; frequently they were given to, or to be exercised with the consent of, the persons bene-

ficially entitled, it being obviously reasonable that these persons should have a voice in the selection of those who are to be intrusted with their property.

Retirement of Trustees under Powers.

Where an appointment of new trustees is made in exercise of a power contained in the instrument creating the trust, the terms of the power must, of course, be strictly adhered to. In framing deeds appointing new trustees of settlements executed before the recent Acts, difficulty often occurs from the ambiguous and inaccurate language of the power which it is proposed to exercise; for instance, a will or settlement sometimes constitutes several classes of trustees for various purposes, and yet the framer of the power in question, losing sight of this classification, vests it in the surviving or continuing trustee or trustees for the time being; thereby raising the question whether each class is to supply vacancies in its own body, or whether the trustees of other classes are to have a voice in the nomination.

Terms of power must be adhered to.

It is to be observed that before the Conveyancing, &c. Act, 1881 (*infra*, p. 7), one of several trustees could obtain his discharge, without the appointment of a successor, only by the consent of the beneficiaries, by order of the Court, or by virtue of *special* provisions enabling him so to do in the instrument creating the trust; but that the provisions of the Act referred to, whereby he is enabled to retire without any new trustee being appointed in his place, applies to *all* trusts created either before or after the commencement of the Act, unless a contrary intention is expressed in the instrument creating the trust, and subject to the terms of that instrument.

Discharge of trustee without appointment of successor.

Statutory Powers of appointing Trustees.]—Recent statutory enactments render it no longer necessary, except under special circumstances, to insert in settlements or wills any express powers of appointing new trustees: generally it will be sufficient merely to nominate the persons who are to exercise the statutory power of appointment.

Statutory powers of appointing new trustees, &c.

The 27th section of the Trustees and Mortgagees Act (23 & 24 Vict. c. 145), commonly known as Lord Cranworth's Act, contained provisions to meet

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Stat. 23 & 24 Vict. c. 145, s. 27.

the case of the omission from instruments creating trusts, of powers of appointing new trustees, and accordingly, since the passing of that Act, the insertion of such powers in settlements and wills has, to some extent, been dispensed with in practice. That this has not been more generally the case is owing to the fact that the provisions of the Act were less complete than the forms of powers commonly in use. The 27th section of this Act enacted as follows (*a*):—

Provisions for appointment of new trustees on death, &c.

"Whenever any trustee, either original or substituted, and whether appointed by the Court of Chancery (*b*), or otherwise, shall die, or desire to be discharged from or refuse or become unfit or incapable to act in the trusts or powers in him reposed, before the same shall have been fully discharged and performed, it shall be lawful for the person or persons nominated for that purpose by the deed, will or other instrument creating the trust (if any), or if there be no such person, or no such person able and willing to act, then for the surviving or continuing trustees or trustee for the time being, or the acting executors or executor, or administrators or administrator of the last surviving and continuing trustee or for the last retiring trustee, by writing, to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying or desiring to be discharged, or refusing or becoming unfit or incapable to act as aforesaid; and so often as any new trustee or trustees shall be so appointed as aforesaid all the trust property (if any) which for the time being shall be vested in the surviving or continuing trustees or trustee, or in the heirs, executors or administrators of any trustee, shall with all convenient speed be conveyed, assigned and transferred so that the same may be legally and effectually vested in such new trustee or trustees either solely or jointly with the surviving or continuing trustees or trustee, as the case may require; and every new trustee or trustees to be appointed as aforesaid, as well before as after such conveyance or assignment as aforesaid, and also every trustee appointed by the Court of Chancery (*b*),

(*a*) This and the following section are given here, notwithstanding their repeal, inasmuch as a large, though gradually diminishing number of trusts are still affected by their provisions. By sect. 71 (2) of the Conveyancing and Law of Property Act, 1881, the repeal is not to affect the validity or invalidity, or any operation, effect or consequence of any instrument executed or made, or anything done or suffered before the commencement of that Act, or any action, proceeding or thing then pending or uncompleted.

(*b*) Now the Chancery Division of the High Court of Justice.

either before or after the passing of this Act, shall have the same powers, authorities and discretions, and shall in all respects act as if he had been originally nominated a trustee by the deed, will or other instrument creating the trust."

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Sect. 28. "The form of appointing new trustees hereinbefore contained may be exercised in cases where a trustee nominated in a will has died in the lifetime of the testator."

This section did not authorize a trustee to retire without the appointment of a new trustee in his place, in the absence of express provision to that effect in the instrument creating the trust. In a case where there was no such provision, and a trustee by retiring rendered a suit necessary for the appointment of a new trustee, it was held that the retiring trustee could not be allowed his costs unless he assigned a sufficient reason for his retiring: *Howard* v. *Rhodes*, 1 Keen, 581. But where the trustees of a marriage settlement filed a bill to be discharged, in consequence of the acts of the tenant for life in repeatedly charging the trust estates and funds with annuities and other incumbrances, thus rendering them responsible for the due application of the income to the payment of such incumbrances, contrary to their intention when they accepted the trusts—which was only to manage the property for the tenant for life and his family—it was directed that the costs of the suit should be borne by the tenant for life: *Coventry* v. *Coventry*, 1 Keen, 758.

Effect of this provision.

The 27th section did not take away the inherent jurisdiction of the Court to increase the original number of trustees: *Viscountess D'Adhemar* v. *Bertrand*, 35 Beav. 19. See also *Re Berry*, W. N. 1873, p. 48, where two trustees were appointed by the Court in the place of an only trustee appointed by the settlor.

The operation of Lord Cranworth's Act was, by the 34th section, limited to instruments *inter vivos* executed after the passing of that Act (28th August, 1860), and to testamentary instruments made, confirmed or revived after that date.

Lord Cranworth's Act was repealed by sect. 71 of the Conveyancing and Law of Property Act, 1881,

Stat. 44 & 45 Vict. c. 41.

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and the last-mentioned Act contains the following provisions with regard to the appointment of new trustees, which seem to meet every case contemplated by the ordinary forms of powers, and apply to all trusts created whether before or after the commencement of the Act.

Appointment of new trustees, vesting of trust property, &c.

Sect. 31.—"(1.) Where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for this purpose by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing or being unfit, or being incapable, as aforesaid.

"(2.) On an appointment of a new trustee, the number of trustees may be increased.

"(3.) On an appointment of a new trustee, it shall not be obligatory to appoint more than one new trustee, where only one trustee was originally appointed, or to fill up the original number of trustees, where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust.

"(4.) On an appointment of a new trustee any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.

"(5.) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance or otherwise, vested in him, shall have the same powers, authorities and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

"(6.) The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will, but dying before the testator; and those relative to a continuing

trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

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"(7.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

"(8.) This section applies to trusts created either before or after the commencement of this Act."

Retirement of trustee.

Sect. 32.—"(1.) Where there are more than two trustees (*c*), if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.

"(2.) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

"(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

"(4.) This section applies to trusts created either before or after the commencement of this Act."

Vesting of trust property in new and continuing trustees.

Sect. 34.—"(1.) Where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest or right.

"(2.) Where a deed by which a retiring trustee is discharged

(*c*) The retirement of a trustee without having a new trustee appointed in his place, or an application to the Court for his discharge, is for the first time authorized by this section. See *post*, p. 9.

By sect. 39 of the Settled Land Act, 1882, it is provided that capital money arising under that Act shall not be paid to less than two "trustees of the settlement," unless the settlement authorizes payment to one such trustee.

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under this Act contains such a declaration as is in this section mentioned by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates.

"(3.) This section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner prescribed by or under Act of Parliament.

"(4.) For purposes of registration of the deed in any registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.

"(5.) This section applies only to deeds executed after the commencement of this Act."

Stat. 45 & 46 Vict. c. 39.

By the Conveyancing Act, 1882, it is enacted as follows:—

Appointment of separate sets of trustees.

Sect. 5.—"(1.) On an appointment of new trustees, a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first mentioned part.

"(2.) This section applies to trusts created either before or after the commencement of this Act."

Events in which the power arises:

Events in which the Power arises.]—These statutory powers of appointing new trustees arise in either of the following events, viz.: where a trustee—(i.) is dead; (ii.) is abroad for twelve months; (iii.) desires to be discharged; (iv.) refuses to act; (v.) is unfit to act, or (vi.) is incapable of acting in the trusts.

(i) death;

The case of death includes the case of a person nominated as trustee of a will but dying before the testator: sect. 31, sub-sect. 6. It is to be observed that the terms of this provision do not extend to cases where any cause of disability other than death

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arises during a testator's lifetime. Where a trustee had become incapable of acting during the lifetime of the testator, he could not be removed with the view of appointing a new trustee in his place under Lord Cranworth's Act: *Newton* v. *Newton*, 55 L. T. 56.

(ii) residence abroad (*e*);

The power of appointing a new trustee in the place of one remaining out of England for more than twelve months arises on the expiration of the statutory term of absence: it may be convenient to supplement this provision by declaring in the instrument creating the trust that the power of appointing a new trustee shall be immediately exerciseable in the case of a trustee going abroad with the intention of permanently residing out of England. If it is desired to appoint a new trustee in the place of a trustee resident out of the jurisdiction, it is not necessary to give notice to the latter: *Re Pye's Trusts*, 42 L. T. 247. Where a settlement provided that a trustee should cease to be such "on departing from the United Kingdom from whatever cause or motive, or under whatever circumstances," it was held that absence abroad unless permanent was no disqualification: *Re Moravian Society*, 24 Beav. 101.

(iii) desire to be discharged;

Formerly, in the absence of express stipulation in the instrument creating the trust, a trustee could not obtain his discharge except by delivering over his office to a successor duly appointed, or by the release of the beneficiaries, or by the order of the Court. Sect. 32 of the Conveyancing, &c. Act, 1881, *supra*, for the first time enables trustees generally

(*e*) The power given by Lord Cranworth's Act did not expressly extend to absence abroad; and it would not appear that such absence, even for a lengthened period and at a great distance from England, necessarily rendered a trustee "incapable to act" within the meaning of that Act, or of a power of appointing trustees in a deed or will. For instance, absence in China or in Australia have been held not to disqualify a person from continuing to act as trustee on the ground of incapacity. See *Withington* v. *Withington*, 16 Sim. 104; *Re Harrison's Trusts*, 22 L. J., Ch. 69. But it is otherwise in the case of *permanent* residence in a foreign country: *Meanard* v. *Welford*, 1 Sm. & G. 426; *Re Bignold*, L. R., 7 Ch. A. 223. See also *Re Lemann*, 22 Ch. D. at p. 635.

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to retire without the appointment of successors, provided that two trustees remain to administer the trust, and provided that the consent of the co-trustees, and other persons, if any, as are empowered to appoint new trustees to the discharge of the retiring trustee, and to the vesting in the co-trustees alone of the trust property be evidenced by *deed*. It is to be observed that the appointment of a new trustee is merely required to be in *writing*. See sect. 31 (1) of that Act, *supra*.

A trustee who desires to retire by reason of want of confidence in his co-trustee is not justified in getting rid of the trust by getting such co-trustee to appoint a new trustee in his place: *Forshaw* v. *Higginson*, 20 Beav. 485; and the principle of this decision must apply equally to the retirement of a trustee without the appointment of a successor, whereby the trust property would be left under the uncontrolled management of a person who he himself distrusts.

(iv) refusal to act;

In the case of *D'Adhemar* v. *Bertrand*, 35 Beav. 19, it was assumed that under Lord Cranworth's Act, sect. 27 (*supra*, p. 4), the description "a trustee who shall refuse to act" included a person who had disclaimed the trust and never acted at all; see also *Re Roche*, 1 Con. & Law. 306; *Walsh* v. *Gladstone*, 14 Sim. 2; *Mitchell* v. *Nixon*, 1 Ir. Eq. R. 155. It has also been held that the words "refusing to act" include the case of a trustee who has accepted and acted in the trusts of a settlement, but refuses to do so any longer, and that such a person ceases to be "a continuing trustee:" *Travis* v. *Illingworth*, 2 Dr. & Sm. 344. This decision was disapproved of by Lord *St. Leonards*, see Sugd. Pow. 886; and *Bacon*, V.-C., has lately held that a trustee who has acted, but has made up his mind to act no longer, is a continuing trustee until he has actually retired: *Re Glenny and Hartley*, 25 Ch. D. 611. But in the very recent case of *Re Norris*, W. N., 1884, p. 159, *Pearson*, J., dissented from the view that in an ordinary case a trustee who is about to retire is a continuing trustee for the purpose of appointing his successor so as to render his concurrence in the appointment

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necessary; his Lordship expressed his preference for the decision in *Travis* v. *Illingworth*, *supra*. Payment into Court under the Trustee Relief Act (22 & 23 Vict. c. 35) has been held to amount to a refusal to act in the trusts: *Re Williams*, 4 K. & J. 87. The executor of a deceased sole trustee has a perfect right to decline to act, and will be entitled to his costs of any proceedings which may be rendered necessary by his refusal: *Legg* v. *Mackrell*, 2 De G., F. & J. 551.

(v) unfitness;

Unfitness will include conviction for felony: *Turner* v. *Maule*, 15 Jur. 761; outlawry: *Re Watts*, 9 Hare, 106; absconding on a criminal charge: *Millard* v. *Eyre*, 2 Ves. jun. 94; using trust property by a trustee for his own purposes: *Ex parte Phelps*, 9 Mod. Rep. 357; committing a breach of trust: *Ex parte Reynolds*, 5 Ves. 707; or other serious misconduct: *Buckeridge* v. *Glasse*, Cr. & Ph. 126; also, vindictive or other improper motives shown to affect the trustee in his administration of the trust, but no mere personal hostility or dissensions between him and the *cestui que trust*: *Earl of Portsmouth* v. *Fellowes*, 5 Madd. 450; *Foster* v. *Davis*, 10 W. R. 180: see also *Att.-Gen.* v. *Clapham*, 4 De G., M. & G. 591; bankruptcy, wherever the nature of the trust is such that the bankrupt has to receive or deal with the trust property so that he can misappropriate it: *Re Roche*, 2 Dr. & W. 287; *S. C.* 1 Con. & Law. 306; *Re Barker*, 1 Ch. D. 43 (*f*); composition with creditors; *Re Adams*, 12 Ch. D. 634; see also *Re Gibbon*, W. N., 1882, p. 12; and in the case of a *feme* trustee, marriage to a foreigner: *Lake* v. *De Lambert*, 4 Ves. 592. Trustees of a charity have been removed on the ground of unfitness, on its being shown that they entertained opinions contrary to the intentions of the founder: *Att.-Gen.* v. *Pearson*, 7 Sim. 290. The fact that a trustee has deviated from his strict duty through misapprehen-

(*f*) See, however, as to special circumstances under which a bankrupt trustee has been retained, there being no imputation on his honesty, *Re Bridgman*, 1 Dr. & Sm. 164. In many cases points will arise of such doubt and difficulty as to render it necessary or advisable to apply to the Court, as to which *vide infra*, p. 16.

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sion is not sufficient ground for the appointment of a new trustee in his place: *Att.-Gen.* v. *Caius College*, 2 Keen, 150; *Att.-Gen.* v. *Coopers' Co.*, 19 Ves. 192.

(vi) incapability.

"Incapability has reference to personal incapacity:" per *Turner*, V.-C., in *Re Watts*, 9 Hare, 108; see also *Re Bignold*, L. R., 7 Ch. App. 223. Where, therefore, the terms of the power referred only to the event of the trustee becoming incapable to act, without the addition of the words "or unfit," a bankrupt trustee was held not to be included in the description: *Bainbrigge* v. *Blair*, 1 Beav. 495. But unfitness is now, as well as incapacity, included among the events in which the statutory power of appointing new trustees arises. Incapability will include lunacy: *Re Boyce*, 12 W. R. 359; *Re Chauncey*, 14 W. R. 849. So also where a trustee became of unsound mind, but was not so found by inquisition, the appointment of a new trustee in his stead was upheld: *Re East*, L. R., 8 Ch. 735. And where a trustee became unable to act in the trust, owing to old age and consequent bodily and mental infirmity, the Court appointed a new trustee in her place: *Re Lemann*, 22 Ch. D. 633. Infancy has been regarded as constituting incapability: *Re Garstick*, 1 W. R. 196; *Re Porter*, 2 Jur., N. S. 347; but in *Re Shelmerdine*, 33 L. J., Ch. 474, the Court made an order for the appointment of a new trustee in place of an infant, without prejudice to the infant's liberty to apply to be restored as trustee when he should come of age. If, therefore, it is desired to appoint a trustee in place of an infant, it may be advisable to apply to the Court, as to which *vide infra*.

Who may exercise the power.

Who may exercise the Power.]—The persons by whom the statutory power of appointing new trustees is exerciseable are the person or persons nominated for this purpose by the instrument creating the trust, the surviving or continuing trustees or trustee, and the personal representatives of the last surviving or continuing trustee.

Persons nominated by the instrument.

As regards the first category, the persons nominated by the instrument creating the trust will vary

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according to the circumstances of the particular case, and it is not likely that difficulties will often arise in ascertaining the persons intended to be so nominated. In a settlement, executed in 1878, was contained a declaration that the husband and wife during their joint lives, and the survivor of them during his or her life should "have the power to appoint new trustees for this settlement;" it was held that the husband and wife were the persons nominated for the purpose within sect. 31 of the Conveyancing, &c. Act, 1881, and therefore had power after the commencement of that Act to appoint a new trustee in the place of one who had remained abroad for more than twelve months, though no vacancy was thereby created under Lord Cranworth's Act: *Re Walker and Hughes' Contract*, 24 Ch. D. 702.

Alienation of beneficial interest by donee of power.

The question has frequently been raised whether a power of appointing new trustees is capable of exercise by a donee of the power who has alienated or incumbered his interest under the instrument creating the power. On this subject Mr. Lewin lays down the following doctrine:—"If a tenant for life has a *power* of appointing new trustees, and *sells his life interest*, the power can no longer be exercised by himself alone, for it is unreasonable that he should nominate a trustee to the prejudice of the person to whom he has alienated the beneficial interest. If he has only *mortgaged* his life interest, he may not be able to appoint a trustee behind the back of the mortgagee, but there can be no objection to such an exercise of the power if it be done with the consent of the mortgagee. And even in the case of *absolute assignment*, an appointment with the consent of the assignee could not be impeached." Lewin on Trusts, p. 570.

The first reported case on this question in recent times is that of *Lord Leigh* v. *Ashburton*, 11 Beav. 470, where a power of sale was given to trustees, with the consent of the tenant for life. Judgments having been entered up against the tenant for life, it was objected by a purchaser, in answer to a bill for specific performance, that the tenant for life by parting with his life estate had occasioned a suspension of his power of consenting. The plaintiff de-

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murred. Lord *Langdale*, M. R., observed on the fact that the judgment creditors had not been made parties, but he refused to decide the case on demurrer, and ultimately the suit was compromised. In *Warburton* v. *Farm*, 16 Sim. 625, a power of sale of lands had been given to trustees with the consent of the tenant for life, who mortgaged his life interest, and subsequently the mortgagee, in exercise of his power of sale, sold and conveyed the life interest to a third person. It was held that the tenant for life's power to *consent* to a sale of the lands was not destroyed by the alienation of his life interest.

In the two cases of *Holdsworth* v. *Goose*, 29 Beav. 111, and *Eisdell* v. *Hammersley*, 31 Beav. 255, it was decided that a power of sale given to trustees at the request or with the consent of the tenant for life was not extinguished by his bankruptcy; in both those cases, the assignees having expressed their readiness to concur, it was held that a good title could be made accordingly, and it did not become necessary to decide the point whether the power was exercisable without such concurrence. In *Nelson* v. *Leman*, 1 De G., F. & J. 368, where a power of appointing new trustees of a settlement was given to the tenant for life, who became bankrupt, and many years afterwards appointed trustees under his power, the Lords Justices held, affirming the decision of the Court below, that the new trustees were necessary parties to a suit instituted by a person interested for account of the trust funds; it does not however appear from the report whether the assignee in bankruptcy had concurred in the appointment of new trustees or not. And in *Alexander* v. *Mills*, L. R., 6 Ch. A. 124, where a trustee had a power of sale at the request of the tenant for life, it was held that the absolute alienation by the tenant for life of his interest did not extinguish his power to consent, but that it could still be exercised with the concurrence of the alienee.

In most of the cases above cited, the alienees were willing to concur, and in none of those cases has the question been decided whether the power would have been exercisable in case the alienees had refused to concur. But in a recent case, real and

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personal estate was settled upon trust to provide an annuity for a widow, and subject thereto, for the benefit of her son absolutely, to whom, "during his life," was given the power of appointing new trustees of the settlement; the son mortgaged his whole interest in the property, part of which was sold by the mortgagees under their power of sale; it was held by *North*, J., that the power to appoint new trustees was exercisable by the son, without the consent of the purchaser from the mortgagees: *Hardaker* v. *Moorhouse*, 26 Ch. D. 417. It is, however, conceived that having regard to the special circumstances of this case as regards the terms of the settlement and otherwise, it is generally advisable in cases where the donee of a power has alienated his interest by way of sale or mortgage, to obtain the concurrence of the alienees in appointing new trustees.

Surviving or continuing trustees.

A continuing trustee includes a refusing or retiring trustee, if willing to act in the matter of appointing his successor, and vesting in him the trust estate (see sect. 31 (6) of the Act, *supra*, p. 6). So where one of two trustees died and the other became bankrupt, the latter was held to be a "surviving or continuing" trustee for the purpose of exercising the power: *Re Roche*, 1 Con. & Law. 306. It is clear that the decision has reference to the constitution of the trust at the time when the power is exercised, and that persons who have formerly been trustees, but have retired from the trust, are not "surviving" trustees having any right to interfere. See *Cafe* v. *Bent*, 5 Ha. 37.

Discharge of trustee by application to the Court.

Application to the Court for Discharge.]—A trustee may always on proper and sufficient grounds obtain his discharge by means of an application to the Court for that purpose. See Lewin on Trusts, p. 572. It must, however, be borne in mind that the provision contained in sect. 32 of the Conveyancing, &c. Act, 1881, with regard to the retirement of a trustee without the appointment of a successor, requires the consent of his co-trustees or of such other person as is empowered to appoint new trustees, and confers no fresh powers on the Court to grant a discharge without such consent. But in a case where

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a trustee wished to retire, and a successor could not be found, the Court, under the Trustee Acts, appointed the continuing trustees to be the *sole* trustees: *Re Stokes*, L. R., 13 Eq. 333. See also *Re Harford*, 13 Ch. D. 135. Where a trustee retired without giving sufficient reason for so doing, and thereby rendered a suit necessary for the appointment of his successor, his costs were disallowed: *Howard* v. *Rhodes*, 1 Keen, 581. See also *White* v. *White*, 5 Beav. 221.

Appointment of trustees by the Court.

Notwithstanding the statutory powers given by the recent Acts, an application to the Court will still occasionally be necessary or expedient for the appointment of new trustees; as where the instrument creating the trust neither nominates any person for the purpose of making such appointment nor appoints any trustees, or where the persons so nominated or appointed are unwilling, or from some cause or other are unable to act in the execution of the express or statutory power.

The Chancery Division of the High Court of Justice, as successor of the Court of Chancery, has inherent jurisdiction in a cause to appoint trustees of a will where no trustees have been appointed by the testator: *Dodkin* v. *Brunt*, L. R., 6 Eq. 580; see also *Re Moore*, 21 Ch. D. 778.

Trustee Act, 1850.

By the Trustee Act, 1850 (13 & 14 Vict. c. 60), it is enacted that:—

Sect. 32. "Whenever it shall be found expedient to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court of Chancery to make an order appointing a new trustee or new trustees either in substitution for, or in addition to any existing trustee or trustees."

Sect. 33. "The person or persons who, upon the making of such order as last aforesaid, shall be trustee or trustees, shall have all the same rights and powers as he or they would have if appointed by decree in a suit duly instituted."

The Court has power to vest lands in the trustees so appointed (sect. 34); and also to vest in them the right to call for a transfer of stock, to receive dividends, &c., and to sue for choses in action subject to the trust (sect. 35); but the appointment by

Appointment by the Court.

the Court of new trustees is not to discharge the old trustees from their liability (sect. 36). An order for the appointment of new trustees may be made upon the application of any person beneficially interested in the trust property (*g*), or any person duly appointed as a trustee thereof (sect. 37). Sects. 40—44 relate to the mode of procedure on an application to the Court for appointment of new trustees, as to which see Seton, pp. 499 *et seq.*; Daniell, Chan. Prac. ch. xxxviii. sect. 4.

By the Trustee Extension Act, 1852 (15 & 16 Vict. c. 55), the Court is empowered to appoint new trustees in lieu of persons convicted of felony (sect. 8); and in cases where there are no existing trustees (sect. 9). And by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), sect. 147—

Application of Trustee Act to bankruptcy of trustee.

"Where a bankrupt is a trustee within the Trustee Act, 1850, section thirty-two of that Act shall have effect so as to authorize the appointment of a new trustee in substitution for the bankrupt (whether voluntarily resigning or not) if it appears expedient to do so, and all the provisions of that Act and of any other Act relative thereto, shall have effect accordingly."

When the Court will appoint new trustees.

Where the donees of a power of appointing new trustees were in India, the Court made the appointment: *Re Humphry*, 1 Jur., N. S. 921. And the Court has occasionally appointed new trustees to save the expense of taking out administration to the last surviving trustee. See *Re Matthews*, 2 W. R. 85; *Davis* v. *Charter*, 6 W. R. 416.

If the trust property is under the administration of the Court, its sanction is required to the appointment of new trustees, however large the terms of the power may be: *Webb* v. *Earl of Shaftesbury*, 7

(*g*) A person contingently entitled may present a petition under this section: *Re Sheppard*, 4 De G., F. & J. 423. Where there are infant *cestuis que trust*, they must be made parties by their next friends: *Re Fellows*, 2 Jur., N. S. 62. A lunatic *cestui que trust* must petition by his next friend; his committee is not "beneficially entitled" within the meaning of this section: *Re Bourke*, 2 De G., J. & S. 426. Where a decree for sale had been made, it was held that a purchaser might properly present a petition: *Ayles* v. *Cox*, 17 Beav. 524; *Gough* v. *Bage*, 25 L. T., N. S. 738. Several purchasers of different lots may jointly present a single petition: *Rowley* v. *Adams*, 14 Beav. 130.

Appointment by the Court.

Ves. 480. See also *Attorney-General* v. *Clark*, 1 Beav. 467; *Cafe* v. *Bent*, 3 Ha. 245. But the appointment of a trustee may be made under a power without applying to the Court, while an action is merely pending: *Graham* v. *Graham*, 16 Beav. 550; *Thomas* v. *Williams*, 24 Ch. D. 558. Even after an order for administration, where parties in the cause have the power of appointing new trustees, they may still exercise that power, but the Court must confirm the appointment, and will see that improper persons are not appointed: *Tempest* v. *Lord Camoys*, 21 Ch. D. at p. 578. See also *Re Gadd*, 23 Ch. D. 134; *Re Norris*, W. N. 1884, p. 159. As to who are proper persons to be appointed trustees, see *infra*, p. 20.

The Court has power to appoint new trustees, although there is a power for that purpose in the instrument creating the trust: *Re Fauntleroy*, 10 Sim. 252. But there is no jurisdiction under the Trustee Act, 1850, to take away the power of appointing new trustees from the donee of a power, when the donee is able and willing to exercise it, even though he may have shown an intention to exercise his power corruptly: *Re Hodson*, 9 Ha. 118. And the Court will not generally entertain an application to appoint new trustees, where the appointment can be made out of Court under a statutory or other power: *Re Soulby*, 21 W. R. 256; and see the observations of *Kay*, J., in *Re Gibbon*, 30 W. R. 287. The Court has appointed new trustees where it was doubtful whether the power applied to the circumstances which had occurred: *Re Woodgate*, 5 W. R. 448; *Re Armstrong*, *ibid.*; *Cooper* v. *Macdonald*, 14 W. R. 755.

An application to the Court is necessary for the purpose of removing a trustee against his will; and there is no jurisdiction under the Trustee Acts, where the removal is sought on the ground of alleged misconduct, other than proved felony; in such a case an action must be brought for the removal of the trustee: *Re Blanchard*, 3 De G., F. & J. 131 (*h*). A bankrupt trustee may be removed on

(*h*) The Court has jurisdiction under the Trustee Acts to appoint a new trustee in the place of one permanently residing abroad without his consent having been obtained: *Re Bignold*, L. R., 7 Ch. A. 223.

petition, on the ground of unfitness to act; *Re Barker*, 1 Ch. D. 43; *Re Adams*, 12 Ch. D. 634; and a new trustee may be appointed by the Court in his place under sect. 31 of the Conveyancing, &c. Act, 1881 (*supra*, p. 6). See *Re Gibbon*, 30 W. R. 287. Appointment by the Court.

It was formerly considered that where powers were given to trustees by name, and the survivors and survivor of them, and the executors or administrators of such survivor, the powers of sale and other powers given to them by the instrument creating the trust could not be exercised by trustees appointed by the Court; *Newman* v. *Warner*, 1 Sim., N. S. 457; but that where the power was conferred not on persons named in their individual character, but in their character as trustees, and annexed to the office, it might be exercised by the trustees for the time being, whoever they might be, and whether appointed by the Court or otherwise. And now by the 33rd section of the Conveyancing and Law of Property Act, 1881, it is enacted that—

Powers of new trustees appointed by the Court.

"(1.) Every trustee appointed by the Court of Chancery, or by the Chancery Division of the Court, or by any other Court of competent jurisdiction, shall, as well before as after the trust property becomes by law or by assurance or otherwise vested in him, have the same powers, authorities and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

"(2.) This section applies to appointments made either before or after the commencement of this Act."

This section differs from sect. 27 of Lord Cranworth's Act (q. v., *ante*, p. 4), in that it empowers the trustees to act before the property is vested in them, and also in that it includes trustees appointed not only by the Court of Chancery and the Chancery Division, but also by all other Courts of competent jurisdiction, such as the Court of Chancery of the County Palatine of Lancaster (13 & 14 Vict. c. 60, s. 21; 15 & 16 Vict. c. 55; 17 & 18 Vict. c. 82, s. 11); the Lord Chancellor, Lords Justices or other judges of the High Court sitting in Lunacy (15 & 16 Vict. c. 87, s. 15; 38 & 39 Vict. c. 77, s. 7. See also

Who may be appointed.

Re Lamotte, 4 Ch. D. 325); and County Court judges (28 & 29 Vict. c. 99).

Settled Land Act, 1882.

As regards settled land, where there are no trustees of a settlement within the definition in the Settled Land Act, 1882, or where in any other case it is expedient that new trustees of a settlement be appointed, the Court may, if it thinks fit, on the application of the tenant for life or other person interested, appoint fit persons to be trustees under the settlement for purposes of that Act. See sect. 38 of the Act, which will be fully set out and discussed in a later part of this Work, sub tit. SETTLEMENTS.

Who may be appointed.

Who may be appointed Trustees.]—If a donee of a power of appointing new trustees appoints improper persons he will be personally liable to pay the costs of their removal and of the appointment of proper persons in their place: *Raikes* v. *Raikes*, 32 Beav. 403.

General principles.

The question as to who are proper persons to be appointed trustees has usually come under judicial notice in cases where applications have been made to the Court to appoint trustees, and the persons proposed for appointment have been accepted or rejected by the Court.

The principles which guide the Court in the selection of persons to act as trustees were stated as follows by *Turner*, L. J., in the case of *Re Tempest*, L. R., 1 Ch. A. at pp. 487 *et seq.*: first, the Court will have regard to the wishes of the persons by whom the trust has been created, if expressed in the instrument creating the trust, or clearly to be collected from it; secondly, the Court will not appoint a person to be trustee with a view to the interest of some of the persons interested under the trust, in opposition to the interests of others of the *cestuis que trust*; thirdly, the Court will have regard to the question whether his appointment will promote or impede the execution of the trust, for the very purpose of the appointment is that the trust may be better carried into execution; but the mere fact that the continuing trustee has refused to act with the proposed trustee is not sufficient ground for the Court to refuse to sanction the appointment. These principles should as far as possible be adhered to in the appointment

of trustees under powers conferred by statute, and by instruments whereby trusts are created.

Who may be appointed.

Mr. Lewin states in his well-known treatise that "*cestuis que trust* are not, as such, incapacitated from being trustees for themselves and others; but, as a general rule, they are not altogether fit persons for the office in consequence of the probability of a conflict between their interest and their duty." See Lewin on Trusts, p. 37.

Cestui qui trust.

The general rule was thus stated by *Turner*, L. J., in the case of *Re Conybeare*, 1 W. R. 458:—"Under ordinary circumstances the Court will not appoint a trustee who is also one of the *cestuis que trust;* but the rule is not imperative; and when there are special circumstances, the Court will exercise its discretion in judging whether the case is one in which the rule may be departed from." See also *Ex parte Clutton*, 17 Jur. 988; *Re Clissold*, 10 L. T. (N. S.) 642.

In *Foster* v. *Abraham*, L. R., 17 Eq. 351, *Jessel*, M. R., upheld the appointment of the tenant for life in possession under a will as one of the trustees with power of sale over the settled property. But the same eminent judge, in a M.S. case cited by Mr. Lewin (*Re Lowdell*, M. R., 11th June, 1877), refused to appoint a husband to be a trustee of his own marriage settlement, though all parties interested concurred in the application, and no other person could be found to accept the office, on the ground that the wife, who took a life interest for her separate use without power of anticipation, would not be properly protected. See Lewin on Trusts, p. 38.

Where a will contained no power of sale, and accordingly an application was made for the appointment of "trustees of a settlement" by the Court for the purposes of the Settled Land Act, 1882, *Pearson*, J., refused to appoint the tenant for life as such trustee, although he was one of the trustees nominated by the testator, on the ground that, under the provisions of that Act, the trustees have, in conjunction with the tenant for life, such great powers over the settled property that it is necessary to protect the interests of the remainderman by exercising special care to appoint indifferent persons: *Re Harrop*, 24 Ch. D. 717.

Who may be appointed.

Solicitor of *cestui que trust.*

The Court has repeatedly refused to appoint "as trustees of the settlement" under that Act the solicitor of the tenant for life. See *Wheelwright* v. *Walker*, 24 Ch. D. 752; *Re Kempe* (C. A.), 31 W. R. 930. In the latter case the solicitor had been originally appointed by the settlor as trustee of the property, but without the power of sale necessary to constitute him a "trustee of the settlement" within the meaning of the Act.

Where in an administration action, after judgment had been pronounced, one of two trustees wished to retire, the Court refused to allow the other trustee, who was the solicitor of some of the beneficiaries, to appoint, as successor to the retiring trustee, his own partner. *Pearson*, J., said that although, if the trusts of the will were not being administered by the Court, the appointment would not render deeds executed by the proposed trustee bad, yet the Court ought not to sanction such an appointment: *Re Norris*, W. N. 1884, p. 159.

Relatives of *cestui que trust.*

The appointment of near relatives of the *cestuis que trust* is not admissible if it is possible to get some one not connected with the family to undertake the office. "I have always observed that the worst breaches of trust are committed by relatives, who are unable to resist the importunities of their *cestuis que trust* when they are nearly related to them:" per *Romilly*, M. R., in *Wilding* v. *Bolder*, 21 Beav. 222. It is, however, often difficult to induce strangers to undertake the duties and liabilities of a trustee, and in one case the Court appointed two husbands of *cestuis que trust* entitled in remainders as trustees: *Re Davis*, L. R., 12 Eq. 214. And in another case a *feme sole*, who was a member of the family, was appointed: *Re Berkeley*, L. R., 9 Ch. A. 720. In appointing a *cestui que trust*, or the husband of a *cestui que trust*, to be a trustee, the Court has sometimes required an undertaking from the appointee that if he should become sole trustee, he would take immediate steps for the appointment of a co-trustee. See *Re Hattatt*, W. N. 1870, p. 14; *Re Burgess*, W. N. 1877, p. 87; *Re Parrott*, 30 W. R. 97.

Donee of the power.

"With regard to the question whether the donee

of a power to appoint new trustees may appoint himself, it is conceived that the answer must be in the negative, both because such appointment is generally open to the objections before stated to the appointment of beneficiaries as trustees, and also because the appointor cannot be regarded as altogether a proper person to judge of his own qualifications for a post of authority and trust." See Lewin on Trusts, p. 569. Who may be appointed.

With a view to the efficient administration of the trust in the interest of all the beneficiaries it is necessary that the trustees should be persons legally competent to exercise discretion.

The legal disabilities of a married woman have been regarded as arising, not from want of judgment, but from being under the power of the husband, she having as much judgment as if discovert: per Lord *Hardwicke* in *Hearle* v. *Greenbank*, 1 Ves. 305. A married woman is accordingly competent to be a trustee, but such appointments are so liable to be attended with inconvenience that they should, if possible, be avoided. See *Lake* v. *De Lambert*, 4 Ves. 592. Married women.

Some of the inconveniences referred to have been removed by recent legislation: thus the Married Women's Property Act, 1882, enacts that—

Sect. 18. "A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person or persons, *or a trustee alone or jointly as aforesaid of property subject to any trust*, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband."

But it will be observed that this section leaves untouched the law with regard to the transfer of other kinds of property not therein mentioned, *e. g.*, real property and choses in action. If, therefore, a married woman be a trustee for sale of land, it will still be necessary that she should convey the pro-

Who may be appointed.

perty to the purchaser by means of a deed acknowledged, with the concurrence of her husband. And it would appear that the receipt of the husband as well as of the wife should be required by any person paying to the latter, as trustee, any moneys belonging to the trust estate. See *Drummond* v. *Tracey*, Johns. 611. Sect. 24 of this Act, however, does away with the responsibility of the husband for breaches of trust committed by his wife, which responsibility formerly rendered his concurrence necessary to any act done by her in execution of the trust. See Lewin on Trusts, p. 32, and the cases there cited. This section enacts as follows:—

Interpretation of terms.

"The word 'contract' in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word 'property' in this Act includes a thing in action."

By the stat. 37 & 38 Vict. c. 78, s. 6, a married woman in whom freehold or copyhold hereditaments are vested as a *bare* trustee (*h*) may convey or surrender the same as if she were a *feme sole* (*i*).

Bare trustee.

(*h*) The meaning of the term "bare trustee" is discussed in Dart, V. & P. at p. 517, where the opinion is expressed that "it will probably be held to mean a trustee to whose office no duties were originally attached, or who, although such duties were originally attached to his office, would, on the requisition of his *cestuis que trust*, be compellable in equity to convey the estate to them, or by their direction, *and has been requested by them so to convey it.*" But *Hall*, V.-C., approved of this statement except as regards the words in italics, which he considered not to be "an important or necessary ingredient to a person being a bare trustee": *Christie* v. *Ovington*, 1 Ch. D. at p. 281. See also *Morgan* v. *Swansea Urban Sanitary Authority*, 9 Ch. D. 582.

Feme sole.

(*i*) It was formerly the practice of the Court to refuse to appoint a *feme sole* as trustee, having regard to inconvenience which might arise in the event of her marriage: *Brook* v. *Brook*, 1 Beav. 531. But in recent times such appointments have been made where there has been a difficulty in finding any other suitable person to undertake the office: *Re Campbell*, 31 Beav. 176; *Re Berkley*, L. R., 8 Ch. 720.

Who may be appointed.

There is no positive rule of law that an infant cannot be a trustee; *Jevon* v. *Bush*, 1 Vern. at p. 343; but the objections to his holding the office are so great that the Court will remove an infant therefrom, on the ground that it is "expedient" that an adult should be appointed in his place; *Re Porter*, 25 L. J., Ch. 482; *Re Gartside*, 1 W. R. 196; but without prejudice to the right of the infant to be restored as trustee on attaining his majority: *Re Shelmerdine*, 33 L. J., Ch. 474. An infant in the eye of the law is regarded as utterly wanting in capacity: *Grange* v. *Tiving*, 6 Bing. 109; and cannot exercise a power of sale: *Hearle* v. *Greenbank*, 1 Ves. 298; *King* v. *Bellord*, 1 H. & M. 343; or any other power which requires judgment and discretion: *Russell's case*, 5 Rep. 27. Moreover, an infant cannot be made liable for breach of trust: *Whitmore* v. *Wald*, 1 Vern. 328; *Hindmarsh* v. *Southgate*, 3 Russ. 324; *Stott* v. *Meanock*, 31 L. J., Ch. 746.

Infants.

Foreigners, and persons out of the jurisdiction.

The appointment of a foreigner is not necessarily inexpedient, but a person domiciled abroad is generally not a fit person for the office, whether he is a foreigner or a British subject, inasmuch as he is not amenable to the jurisdiction of the Court. See *Meinartzhagen* v. *Davis*, 1 Coll. 335; *Re Guibert*, 16 Jur. 852. So upon petition under the Trustee Act, 1850, the Court refused to sanction the appointment of trustees resident in New Zealand: *Re Long*, 17 W. R. 218. But the appointment of trustees resident in Canada was sanctioned in *Re Smith*, 20 W. R. 695; and in a recent case, where all the *cestuis que trusts* of a fund invested in English railways were resident in Australia, *Malins*, V.-C., appointed as trustees two persons resident in Australia by whom it was intended that the investments should be realized, and the proceeds re-invested in the colony: *Re Liddiard*, 14 Ch. D. 310.

Bankrupt.

A bankrupt is not, as such, incapable of being appointed a trustee; past or subsequent acts of bankruptcy will not affect the trust estate. See Lewin on Trusts, 37.

Number of trustees to be appointed.

Formerly on an appointment of trustees under a power it was not competent to increase or diminish the number of trustees originally appointed, unless

Number of Trustees.

it was otherwise expressly provided in the power itself: *Ex parte Davis*, 2 Y. & C. Ch. C. 468. Now, however, the rule is reversed, and the original number may be increased or diminished, unless a contrary intention is expressed in the instrument creating the trust, and provided that, except only where one trustee was originally appointed, at least two trustees are left to administer the trust.

The Court has never in modern times considered itself bound to adhere strictly to the number of trustees originally appointed by the settlor. The number has been frequently increased: *Re Boycott*, 5 W. R. 15; *Grant* v. *Grant*, 34 L. J., Ch. 641; *Plenty* v. *West*, 16 Beav. 356; *Birch* v. *Cropper*, 2 De G. & Sm. 255; *Re Tunstall*, 4 De G. & Sm. 421; *Re Brackenbury*, L. R., 10 Eq. 45.

The Court in its discretion will generally refuse to diminish the original number of trustees; but under special circumstances a lesser number, not being less than two, has been appointed instead of a greater number: *Re Marriott*, 18 L. T., N. S. 749; *Bulkely* v. *Earl of Eglinton*, 1 Jur., N. S. 994; *Re Tout*, 32 W. R. 734. And where upon the retirement of a trustee it has been found difficult to find a successor, the continuing trustees have been appointed as sole trustees: *Re Stokes*, L. R., 13 Eq. 333; *Re Harford*, 13 Ch. D. 135; *Re Crowe*, 14 Ch. D. 610. It has been held to be improper, where there were several trustees, for all to retire, appointing a sole trustee in their place: *Hulme* v. *Hulme*, 2 My. & K. 682; but see *Re Cunningham*, W. N. 1877, p. 258; and *West of England, &c. Bank* v. *Murch*, 23 Ch. D. 138. And the Court will not appoint a sole trustee; *Re Dickinson*, 1 Jur., N. S. 724; *Viscountess D'Adhemar*, 35 Beav. 20; except under very special circumstances: *Re Reynault*, 16 Jur. 233. Where, however, a single trustee had been originally appointed, Lord *Mansfield* held that the trustee on retiring could not appoint more than a single trustee in his place: *R.* v. *Lexdale*, 1 Burr. 448. Now, however, where a single trustee has been originally appointed, on his death or retirement, a single trustee or several trustees may be appointed, as may seem expedient.

Forms of Deeds of Appointment.

Separate trustees of distinct shares.

Separate sets of trustees of distinct shares of a trust fund limited upon different trusts have been appointed by the Court on petition under the Trustee Act, 1850: *Re Cottrill's Trusts*, W. N. 1869, p. 183. But it has not been hitherto considered that this could be done under the ordinary form of power of appointing new trustees. See Lewin on Trusts, 569, and the cases there cited. It is conceived that the statutory power now given of appointing separate sets of trustees (*vide ante*, p. 8) applies where several parts of the property are held on distinct trusts for certain limited estates or interests, although the ultimate limitations may hereafter have the effect of uniting the parts into a single fund. See Wolst. Conv. 137.

Mode of framing deeds of appointment of new trustees.

Forms of Deeds of Appointment of New Trustees.] —In cases where a trust is created by deed, it has hitherto been usual to appoint new trustees by a deed endorsed on the settlement. This practice is still often adopted when the settlement is engrossed in the old fashion on large skins; but the more usual and convenient course is to make such appointments by deed annexed or supplemental to the settlement, as the deed of appointment may be forwarded for execution to the several parties without the necessity of also forwarding the original instrument. In the case of an endorsement, or of an annexed or supplemental deed, the recitals will commence with the first event affecting the trust which happened after the date of the execution of the principal deed, or of the last preceding deed of appointment, and will carry on the narrative of the dealings with the trust property, &c. up to the date of the appointment.

Parties.

If no person has been nominated by the instrument creating the trust for the purpose of appointing new trustees, and the appointment is made by virtue of the statutory power, the appointors will be the continuing or surviving trustees, or the representatives of the last such trustee. It is desirable that the concurrence of such beneficiaries as are *sui juris* should be obtained, and testified by their being made parties to the deed, so as to prevent any question

Forms of Deeds of Appointment.

being raised by them hereafter as to the propriety of the appointment, and also to show that it was made with the approval of all persons interested who were at the time competent to approve. Where there is a retiring trustee, he should be made a party to testify his willingness to retire, and for the purpose of concurring in the appointment of the new trustee, if he is willing to act for this purpose, and also, if necessary, of conveying the trust property. So also, where the appointment is made under an express power by a tenant for life, the concurrence of the existing trustees should be obtained, so as to show their assent to the appointment.

Where new trustees of a will are to be appointed, the appointment must of course be made by an independent deed, and the same course may sometimes be adopted, under special circumstances, in appointing trustees of a settlement created by deed. In such case, the instrument creating the trust must be shortly recited, so far as to show the nature of the gift to the trustees. The trusts themselves need not be set out, but the power (if any) to appoint new trustees, or the nomination of the person who is to exercise the statutory power, must be fully recited. Where the draftsman has sufficient information to enable him to do so, it will generally be well to set out as far as possible in detail the history of the dealings with the trust estate, so that the instrument creating the trust, the successive appointments of trustees, and the ultimate release on the final distribution of the property, may afford a continuous history of the trust. It may sometimes be convenient, where there have been dealings with the trust funds involving complications of account, for the dealings with the property to be set out in a schedule, in the form of a debtor and creditor account, as suggested by Mr. Wolstenholme in his treatise on the Conveyancing Act at page 327.

Release to retiring trustee.

Retiring trustees frequently ask for a release, but they have no legal right to make such a demand. All that can be required by a retiring trustee from his successor is a written acknowledgment as to the property which has been transferred to him. An outgoing trustee is of course released by his discharge

Vesting the Trust Estate.

from all liability with regard to the trust property from the time he ceases to be a trustee; but with respect to antecedent transactions, he cannot generally obtain a complete release, unless the instrument creating the trust contains an express authority to the donee of the power to give it, because, on an appointment of new trustees, it almost invariably happens that the eventual owners of the property under the trusts are either not in existence, or are minors; but of course a retiring trustee may obtain a release from his co-trustees and such of the beneficiaries as are *sui juris*, if they are willing to give it; and such a release is frequently given where a trustee retires owing to differences of opinion as to the administration of the trust. It is usual, on the final adjustment of the trust accounts, for releases to be given to the trustees, on handing over the balance of the property to the persons absolutely entitled; it is, however, quite clear that such releases cannot be claimed as of right. See Lewin on Trusts, 326; and see *post*, sub tit. RELEASES (*i*).

Vesting the trust estate.

Mode of vesting the Trust Estate.]—The 34th section of the Conveyancing Act, 1881 (*vide ante*, p. 7), facilitates the vesting of the legal estate (*k*) on a

As to giving to the outgoing trustee a counterpart.

(*i*) In the former editions of this work the opinion was expressed that where the appointment of a new trustee is effected by an independent deed, it is proper that it should be executed in duplicate, and that a counterpart should be given to the retiring trustee as evidence of his discharge from continuing liability. It does not, however, appear, that this view has been extensively acted upon in practice, except where a release is given to the outgoing trustee, and forms part of the deed appointing the new trustee; and it is not clear that the outgoing trustee can demand a counterpart, even at his own expense; he has, however, a right to an examined copy of the deed appointing the new trustee: *Warter* v. *Anderson*, 11 Hare, 301. If the appointment is indorsed upon the original trust deed, or is expressed to be supplemental and is actually annexed thereto after execution, there will be no need for a counterpart, because the deed which creates the outgoing trustee's liability cannot be produced without exhibiting also the proof of his discharge. Moreover, a detached counterpart of an endorsed or supplemental deed, not having any explanatory recitals, would be hardly intelligible.

(*k*) A vesting declaration is necessary only where the *legal* estate is to be vested in the new and continuing trustees jointly,

Vesting the Trust Estate.

Vesting declaration.

change of trustees by substituting in certain cases a vesting declaration for the formal conveyance formerly necessary. The declaration must be contained in the deed by which a new trustee is appointed, or by which a retiring trustee is discharged; if therefore a trustee be appointed by a writing not under seal (see sect. 31 (1) of the Act, *ante*, p. 6), the trust property must be vested, according to its nature, by the ordinary methods, in the persons who become the trustees by virtue of such appointment (*l*). The same course must be adopted in any case where it is thought advisable to vest trust property in trustees by a separate instrument, *e. g.*, when lands are purchased with settlement money. See Wolst. Conv. Acts, 85. A valid vesting declaration may be made by any deed executed after the commencement of the Act, by which a new trustee is appointed to perform *any trust*, and consequently by a deed appointing a trustee under a power in a settlement dated before the commencement of the Act.

Copyholds, &c., excluded from operation of a declaration.

Copyholds and customary lands are excepted from the provisions of this section, in order not to prejudice the rights of lords of manors. Mortgages are excluded from the operation of this section in order to avoid the inconvenience of notice of the

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or in the continuing trustees alone, as the case may be; all equitable interests vest *ipso facto* in the persons who are the trustees by virtue of their appointment, or by the discharge of the retiring trustee; see *Dodson* v. *Powell*, 18 L. J., Ch. 237. A vesting declaration will no doubt prove useful in some cases. For instance, when the outgoing trustee is, by reason of incapacity or of absence abroad, unable to concur so as to convey his estate in the trust property, his concurrence may be dispensed with, inasmuch as the appointors, whether they be his co-trustees or beneficiares, in whom the power of appointment is vested by the instrument creating the trust, may by the declaration divert the property out of the existing trustees, and it will immediately pass to the persons who will be the trustees after the appointment. So, also, where the retiring trustee is a married woman, the vesting of the property by means of a declaration will render unnecessary her concurrence for the purpose of transferring the property, and consequently the deed of appointment will not require acknowledgment.

(*l*) The discharge of a retiring trustee can only be effected by deed. See sect. 32 of this Act.

trusts of the money affecting the title to the land mortgaged. And shares, &c. are similarly excluded in order to reserve to companies and other bodies the right of requiring that transfers should be made in the form prescribed by statute.

Vesting the Trust Estate.

In cases in which it appears necessary or advisable to vest the trust estate otherwise than by a declaration under the statute, the mode of so doing will depend upon the nature of the property of which the estate consists. At common law no person could convey real or personal estate to himself either solely or jointly with another; nor could husband or wife convey to each other. Freeholds, however, can be vested in the new and continuing trustees by a simple conveyance under the Statute of Uses, whereby the hereditaments are conveyed to the new trustee to the use of himself and the continuing trustee; and now, by the 50th section of the Conveyancing and Law of Property Act, 1881—

Other modes of vesting trust property.

Freeholds.

"(1) Freehold land (*m*), or a thing in action may be conveyed by a person to himself jointly with another person, by the like means by which it might be conveyed by him to another person, and may in like manner be conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another person.

Conveyance by a person to himself, &c.

"(2) This section applies only to conveyances made after the commencement of this Act."

A copyholder may surrender to the use of himself or of his wife; so a wife may surrender to the use of her husband: *Bunting* v. *Lepingwell*, 4 Rep. 29 b. On the appointment of new trustees, copyholds are usually vested by means of actual surrender by the old trustee or trustees, and by the admittance of the old and new trustees in pursuance of a covenant to surrender contained in the deed of appointment.

Copyholds.

Leaseholds and other chattel property actually assignable at law may be assigned by any person directly by a single deed to himself and another

Leaseholds, &c.

(*m*) Land includes here incorporeal as well as corporeal hereditaments, and an undivided share of land. See sect. 2 (ii) of the Act.

Vesting the Trust Estate.

under Lord St. Leonards' Act (22 & 23 Vict. c. 35), sect. 21. Formerly two deeds were necessary for the purpose. Choses in action are not within this statute, and some uncertainty has prevailed as to whether the provisions of the Judicature Act, 1873 (36 & 37 Vict. c. 66), sect. 25 (6), have the effect of bringing them within it. Now, however, this point is of little practical importance, as the recent Act expressly renders them assignable by a person to himself jointly with another.

Shares, stocks, &c.

When the trust estate comprises shares, stocks, &c. transferable in the books of a company, the deed of appointment of new trustees will be supplemented by entry in the books of the names of the continuing and new trustees jointly; this may be done either before or after the execution of the deed of appointment. It was formerly usual to add a declaration of trust with regard to the shares and stocks transferred, with the object of making any breach of trust with regard to them a specialty debt; but inasmuch as by virtue of the stat. 32 & 33 Vict. c. 46, specialty debts have no longer any priority in an administration over simple contract debts, there does not seem to be any great advantage in continuing the practice of inserting such a declaration.

Vesting orders.

By the Trustee Act, 1850, sect. 34, the Court is empowered to make vesting orders of lands of any tenure, and for such estate as the Court shall direct; and by sect. 28 of the same Act, the necessity of surrenders and admittance is dispensed with where a vesting order of copyholds is made with the lord's consent, but such consent is not thereby required. Instead of a vesting order, an order may be made under the same section appointing a person to *convey* the copyholds without consent of the lord, and in such case the person appointed must surrender, and the surrenderee must be admitted.

Lunatic trustees, &c.

This Act also gives power to the Lord Chancellor to make vesting orders as to lands in the case of a lunatic trustee or mortgagee (sect. 3); and to discharge any contingent right of a lunatic trustee or mortgagee in respect of lands (sect. 4); and also to vest stock or choses in action of a lunatic trustee or

mortgagee (sect. 5); or of any deceased person whose personal representative is a lunatic (sect. 6)(*n*). Vesting Orders.

The Chancery Division of the High Court of Justice, inheriting the jurisdiction given by the same Act to the Court of Chancery, has power, where an infant is seised or possessed of lands, to make an order vesting such lands in such person or persons or in such manner as the Court shall direct (sect. 7); and to discharge contingent rights of an infant trustee or mortgagee to lands (sect. 8); and has also power to vest lands of a sole or joint trustee out of the jurisdiction (sects. 9 and 10); and to discharge contingent rights of such sole or joint trustee (sects. 11 and 12); also to vest lands held upon trust where it is unknown which of several co-trustees survived, or whether a trustee be living or dead, or who is the heir or devisee of a deceased trustee (sects. 13, 14, and 15); and to discharge the contingent rights of persons unborn, who, if born, would be trustees. Moreover, instead of making a vesting order, the Court may appoint a person to execute any requisite conveyance or assignment or release of lands, and direct the secretary, deputy secretary, or Accountant-General of the Bank of England, or other company to transfer stock to the person or persons named in the order (sect. 20). Powers of the Court as to vesting orders, &c.

The costs and expenses of and incident to the appointment of new trustees under a statutory or other power are generally payable out of the corpus of the trust estate; *Carter* v. *Sebright*, 26 Beav. 376; but they are often paid by the tenant for life if there are no funds in hand available for the purpose. See Lewin on Trusts, 571. Costs.

In the case of an appointment of a new trustee by the Court the costs will generally be ordered to be paid out of the trust estate: *Re Fellows*, 2 Jur., N. S. 62. See also *Forshaw* v. *Higginson*, 20 Beav. 486; *Gardiner* v. *Downes*, 22 Beav. 486. And where

(*n*) This jurisdiction of the Lord Chancellor is now also exercisable by such of the justices of the High Court of Justice or of the Court of Appeal as are intrusted by the Queen's sign manual with the care of lunatics. See 38 & 39 Vict. c. 77, s. 7.

Costs and Stamps.

trustees of two separate funds are appointed upon the same petition, the costs will be payable rateably out of the two funds according to their respective values: *Re Grant*, 2 J. & H. 764. Where, however, the application to the Court is rendered necessary by the retirement of a trustee through caprice or without sufficient reason his costs will not be allowed: *Howard* v. *Rhodes*, 1 Keen, 58.

Stamps.

The schedule to the Stamp Act, 1870 (33 & 34 Vict. c. 97), imposes a duty of ten shillings on an appointment of a new trustee; and by sect. 78 of that Act it is enacted that—

"Every instrument, and every decree of any Court, or of any commissioners, whereby any property, on any occasion except a sale or mortgage, is transferred to or vested in any person, is chargeable with duty as a conveyance or transfer of property.

"Provided that a conveyance or transfer made for effectuating the appointment of a new trustee is not to be charged with any higher duty than ten shillings."

Sect. 8 provides as follows:—

"Except where express provision to the contrary is made by this or any other Act, an instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of such matters."

It has been held that the effect of these provisions is that in the case of an order of the Charity Commissioners appointing trustees and vesting the trust property the duty payable is ten shillings in respect of the appointment of the trustee, and a further sum of ten shillings in respect of the transfer of the property. And there can be no doubt that the principle of this decision applies where a transfer of property is made on the appointment of a new trustee by conveyance, or by vesting declaration under sect. 34 of the Conveyancing and Law of Property Act, 1881. See *Hadgett* v. *Commissioners of Inland Revenue*, 3 Ex. D. 46.

PRECEDENTS.

I. *APPOINTMENT by* WRITING NOT UNDER SEAL *or by* DEED POLL (*a*) *of a* NEW TRUSTEE *under a Power in a Settlement of Money in the Funds.* (*By Endorsement.*)

TO ALL TO WHOM THESE PRESENTS SHALL COME, I [*appointor*], formerly the within named [*maiden name*], and now the widow of the within named [*deceased husband*], deceased, send greeting: WHEREAS the within named [*retiring trustee*] is desirous of being discharged from the trusts of the within written indenture: AND WHEREAS the property now subject to the trusts of the within written indenture consists of the sum of £——— £3 per Centum Consolidated Bank Annuities, and it is intended that the same shall immediately after the execution of these presents be transferred into the joint names of the said [*continuing trustee*] and [*new trustee*]. NOW KNOW YE that in exercise of the power given to me by the within written indenture, and of every other power me hereunto enabling, I hereby appoint

Exordium.

Recitals: of trustee's wish to retire (*b*);

of state of trust property.

Donee of power appoints new trustee.

(*a*) An appointment of a new trustee may be made under the Conveyancing and Law of Real Property Act, 1881, by writing, not under seal, unless a contrary intention is expressed in the instrument creating the trust (*vide ante*, p. 6), and this mode of appointment is sometimes expressly permitted by such instruments; but having regard to the importance of the office of a trustee, it is considered that his appointment should be attended by some degree of solemnity, and therefore generally effected by deed. The stamp is the same in both cases (*ante*, p. 34). If any peculiar formalities as to the mode of execution or attestation of an instrument appointing new trustees are prescribed by the terms of the power, such formalities must of course be strictly observed. Two witnesses are, however, sufficient in all cases under the statute 22 & 23 Vict. c. 35, s. 12, stated *ante*, Vol. I. p. 740, sub tit. APPOINTMENT.

(*b*) The recitals of the marriage and death of the husband are here omitted for the sake of brevity; these facts are implied by the description of the appointor as widow.

I. By Writing or Deed Poll endorsed.

[*new trustee*], of &c., to be a trustee in the place of the said [*retiring trustee*], and to act jointly with the within named [*continuing trustee*] for all the purposes of the within written indenture, or such of the same as are now subsisting and capable of taking effect.

As WITNESS my hand this ——— day of ———, 18—.

or

IN WITNESS whereof I have hereunto set my hand and seal this ——— day of ———, 18—.

II. *ACKNOWLEDGMENT* (*also indorsed on the Settlement above referred to*), *by the* NEW AND CONTINUING TRUSTEES, *that the* STOCK *has been transferred into their Joint Names.*

BE IT REMEMBERED that on the ——— day of ———, 18—, the sum of £———, £3 per centum Consolidated Bank Annuities (being the stock in which the within mentioned property is now invested) was transferred into and is now standing in the joint names of us [*trustees*]. As WITNESS our hands this ——— day of ———, 18—.

(Signed) [*continuing trustee.*]
[*new trustee.*]

III. *APPOINTMENT of two* NEW TRUSTEES *of* REAL *and* PERSONAL PROPERTY *under the* STATUTORY POWER *in the Place of a Deceased Trustee, by Persons nominated by the Settlement for the Purpose.* VESTING DECLARATION. (*By Deed Poll endorsed.*)

Exordium.

Recitals: of marriage;

TO ALL TO WHOM THESE PRESENTS SHALL COME the within named [*husband*] and [*wife*] send greeting: WHEREAS the marriage of the said [*husband*] and [*wife*] was duly solem-

nized shortly after the date of the within written indenture: AND WHEREAS the said [*deceased trustee*] died on the ——— day of ———, 18—: AND WHEREAS the property now subject to the trusts of the within written indenture consists of the several messuages, pieces of land and hereditaments, policies of assurance, securities and things in action, the particulars whereof are specified in the schedule hereunder written: AND WHEREAS the said [*husband*] and [*wife*] are desirous of appointing [*new trustee*], of &c., to be a trustee of the within written indenture in the place of the said [*deceased trustee*] deceased; and also to appoint [*new trustee, No. 2*] to be trustee thereof in order that the number of such trustees may be increased: NOW KNOW YE that the said [*husband*] and [*wife*] in exercise of the power given to them by the joint operation of the Conveyancing and Law of Property Act, 1881, and by the within written indenture (*c*), and of every other power them hereunto enabling, hereby appoint the said [*new trustees*] to be trustees in the place of the said [*deceased trustee*] deceased, and to act jointly with the within named [*surviving trustee*] for the purposes of the within written indenture: AND the said [*husband*] and [*wife*] hereby declare that all the estate and interest now vested in the said [*surviving trustee*] of and in the said messuages, pieces of land, hereditaments and premises, and the right to recover all the things in action mentioned in the said schedule hereunder written respectively, and all other, if any, the debts and things in action, subject to the trusts of the within written indenture shall forthwith vest in the said [*surviving trustee*] and [*new trustees*] as trustees of the within written indenture, and as joint tenants upon the trusts, for the purposes and with and subject to the powers and provisions therein declared and contained of or concerning the property thereby declared to be vested in the said [*surviving trustee*] and [*new trustee*], or to such of the same trusts, purposes, powers and provisions respectively as are now subsisting and capable of taking effect (*d*). IN WITNESS, &c.

of death of trustee;

of state of trust property;

of desire to appoint new trustees.

Appointment of new trustees.

Vesting declaration.

THE SCHEDULE ABOVE REFERRED TO.

(*c*) The husband and wife are here the persons nominated by the settlement for the purpose of appointing new trustees.

(*d*) Notice of the appointment and vesting declaration must be given to the insurance offices as to the policies, and to debtors and others interested as to the securities, choses in action, &c.

IV. *APPOINTMENT of a* NEW TRUSTEE *of* PERSONALTY UNDER *the Statutory Power by Continuing and Retiring Trustees.* RECITALS *as to dealings with the Trust Property.* VESTING DECLARATION. (*By Supplemental Deed.*)

THIS INDENTURE, made the ——— day of ———, 18—, BETWEEN [*continuing trustee*], of &c., and [*retiring trustee*], of &c., of the first part, [*husband*], of &c., and [*wife*] his wife (*e*), of the second part, and [*new trustee*], of &c., of the third part; And supplemental to an indenture dated &c. and expressed to be made between [*parties*] (*g*), and hereinafter referred to as the principal indenture, being a settlement made in consideration of the marriage then intended and which was shortly afterwards solemnized between the said [*husband*] and [*wife*]: AND WHEREAS since the date of the principal indenture two several sums of £——— and £——— respectively have been raised under the power in that behalf therein contained for the advancement in life of [*A. B.*] and [*C. B.*], two of the sons of the said [*husband*] and [*wife*] respectively: AND WHEREAS the sales and investments of and other dealings with the trust property, and the receipts and payments in respect thereof, are set out in the form of a debtor and creditor account in the first schedule hereunder written, from which it appears that there is a balance of £——— standing to the credit of the said [*continuing trustee*] and [*retiring trustee*] in their joint names at the ——— bank: AND WHEREAS the property now subject to the trusts of the principal indenture consists of the said balance of £———, and also of the several stocks, funds, shares, securities, debts, and things in action, the particulars whereof are set out in the second schedule hereunder written: AND WHEREAS there are now living ——— children of the

Parties.

Deed expressed to be supplemental (*f*).

Recitals: of sums raised for advancement;

of sales, and dealings with trust property (*h*).

of present state of the trust property;

of state of family;

(*e*) In this precedent it is assumed that no person was nominated by the settlement for the purpose of appointing new trustees. As to making adult beneficiaries parties, see *ante*, p. 27.

(*f*) As to the nature and effect of supplemental deeds, see *ante*, Vol. I. p. 778, note (*d*).

(*g*) The wife will be here described as "the said [*wife*] by her then name and description of [*wife's maiden name*] spinster, of the —— part."

(*h*) See as to this recital, *ante*, p. 28.

said [*husband*] and [*wife*], namely, the said [*A. B.*] and [*C. B.*] and [*D. B.*], none of whom have attained the age of twenty-one years, and there has been only one other such child, namely, [*E. B.*], who died under that age: AND WHEREAS the said [*retiring trustee*] is desirous of being discharged from the trusts and powers reposed in or conferred on him by the principal indenture: AND WHEREAS the said [*continuing trustee*] and also the said [*husband*] and [*wife*] are desirous that the said [*new trustee*] shall be appointed as trustee of the principal indenture in the place of the said [*retiring trustee*], who is willing to act in the trusts of the same indenture for the purpose of such appointment: AND WHEREAS it is intended that the stocks, funds, shares and mortgage and other securities, the particulars whereof are set out in the first part of the said second schedule hereunder written, shall forthwith, or as soon as may be after the execution of these presents, be transferred or assured according to the nature thereof respectively, so as to be effectually vested in the said [*continuing trustee*] and [*new trustee*] as trustees of the principal indenture: NOW THIS INDENTURE WITNESSETH that the said [*continuing trustee*] and [*retiring trustee*], in exercise of the power in that behalf given to them by the Conveyancing and Law of Property Act, 1881, and of every other power them hereunto enabling, and with the assent and approval of the said [*husband*] and [*wife*], testified by their respective execution of these presents, do hereby appoint the said [*new trustee*] to be a trustee in place of the said [*retiring trustee*], and to act jointly with the said [*continuing trustee*] for the purposes of the principal indenture: AND the said [*continuing trustee*] and [*retiring trustee*], with the consent and approbation of the said [*husband*] and [*wife*] testified as aforesaid, do hereby declare that all the estate and interest now vested in the said [*continuing trustee*] and [*retiring trustee*] of and in the several debts and things in action, the particulars whereof are set forth in the second part of the said second schedule hereunder written, and of

of desire of retiring trustee to be discharged;

of desire to appoint new trustee;

of transfer of stocks, &c. (*i*).

Testatum.

Appointment of new trustee.

Vesting declaration.

(*i*) The transfer of securities, &c., is usually made after the appointment of the new trustee, but sometimes it is made previously. See *post*, p. 59. For a precedent of a transfer of a mortgage on the appointment of a new trustee, the trust not being disclosed, see tit. MORTGAGES.

IV. Of Personalty.

and in all other, if any, the debts and things in action, subject to the trusts of the principal indenture, and the right to recover all or any such debts and things in action respectively, shall forthwith vest &c. [*continuing trustee*] and [*new trustee*], as trustees of the principal indenture, and as joint tenants &c. [*ut ante*, p. 37]. In WITNESS whereof the parties hereto have set their hands and seals on the day and year first above written.

THE FIRST SCHEDULE ABOVE REFERRED TO.

THE SECOND SCHEDULE ABOVE REFERRED TO.

V. *APPOINTMENT of* TWO NEW TRUSTEES *of a Strict Settlement of* FREEHOLD ESTATE, *in the place of a* LUNATIC TRUSTEE, *and of a* TRUSTEE *who is residing abroad.* (*By Separate Deed.*)

Parties.

THIS INDENTURE, made the ——— day of ———, 18—, BETWEEN [*tenant for life and donee of the power*], of &c., of the first part, [*continuing trustee*], of &c., and [*continuing trustee*], of &c., of the second part, and [*new trustee*], of &c., and [*new trustee*], of &c. of the third part: WHEREAS by an indenture of settlement dated the ——— day of ———, 18—, and made between &c. [*parties*], the messuage or mansion-house known as ——— Hall and the several manors, messuages, farms, lands and hereditaments, situate in the parishes of ——— and ——— respectively, in the county of ———, in the same indenture more particularly described, were conveyed to the uses, upon the trusts, and with, under and subject to the powers, provisions and declarations therein limited, declared and contained of or concerning the same premises, whereby the said [*tenant for life*] is now tenant for life thereof without impeachment of waste, with divers remainders over: AND WHEREAS by the same indenture it was

Recitals: of settlement (*k*);

(*k*) Where the instrument creating the trust is a deed, the appointment of new trustees is usually effected by endorsed or supplemental deed, forms of which are given in preceding and following precedents. In the case of new trustees of wills, the appointment must, of course, be effected by a separate deed reciting the will. See *post*, PRECEDENT VIII.

declared that [*recite the power to appoint new trustees*]: AND WHEREAS the said [*tenant for life*], in exercise of his statutory power of sale under or by virtue of the Settled Land Act, 1882, has lately sold certain of the hereditaments comprised in the said indenture of settlement, and the proceeds of such sale have been laid out partly in the purchase of other hereditaments, which by an indenture dated the ——— day of ———, 18—, and made between [*parties*], have been conveyed to the uses of the said indenture of settlement, and partly in improvements of the said settled lands, in accordance with the provisions of the Act hereinbefore referred to: AND WHEREAS the said [*lunatic trustee*] has become afflicted with mental derangement or imbecility, by reason whereof he is incapable of executing the trusts and powers reposed in him by the said indenture of settlement, and although no commission of lunacy has been issued against him, the existence of his said malady appears by a certificate, a copy whereof is indorsed on these presents, the same having been duly taken previously to his being conveyed to a lunatic asylum: AND WHEREAS the said [*trustee resident abroad*] has remained out of the United Kingdom for more than twelve months: AND WHEREAS the said [*tenant for life*] is desirous of appointing the said [*new trustee*] and [*new trustee*], to be trustees of the said indenture of settlement in the place of the said [*lunatic trustee*] and [*trustee resident abroad*] respectively: NOW THIS INDENTURE WITNESSETH that the said [*tenant for life*], in exercise of the hereinbefore recited power contained in the said indenture of settlement, and of all other powers, if any, him hereunto enabling, hereby appoints the said [*new trustee*] and [*new trustee*] respectively, to be trustees of the said indenture of settlement in the place of the said [*lunatic trustee*] and [*trustee resident abroad*] respectively, and to act jointly with the said [*continuing trustee*] and [*continuing trustee*], for the purposes of the within written indenture: AND the said tenant for

of sales by tenant for life;

of lunacy of a trustee (*l*);

of residence abroad of another trustee (*l*);

of desire to appoint new trustee.

Testatum.

Appointment of new trustee.

Vesting declaration (*m*).

(*l*) It is advisable that evidence should be preserved of the events which give rise to the power to appoint new trustees, such as lunacy, residence abroad, &c.

(*m*) If the original trustees took no estate or interest under the settlement, the vesting declaration will be omitted. The assent of the continuing trustees is not necessary to the efficacy of the declaration, but it is desirable that this deed should show on the face of it that such assent has been obtained.

V. Of Freeholds.

life, with the assent of the said [*continuing trustee*] and [*continuing trustee*] respectively, hereby declares that all the estate and interest now vested in the said [*four original trustees*], of and in such of the said messuage or mansion-house, manors, messuages, lands, hereditaments and premises comprised in the said indenture of settlement as remain unsold, and also of and in all the hereditaments and premises comprised in the said indenture of the ——— day of ———, 18—, respectively, shall forthwith vest in the [*continuing and new trustees*], as trustees of the said indenture of settlement, and as joint tenants, upon the trusts and for the purposes of the same. In witness, &c.

VI. *APPOINTMENT of a* New Trustee *by Continuing and Retiring Trustees under the Statutory Power.* Grant *of* Freeholds. Covenant to surrender Copyholds.

Parties.

THIS INDENTURE, made the ——— day of ———, 18—, Between [*continuing trustee*], of &c., and [*retiring trustee*], of &c., of the one part, and [*new trustee*], of &c., of the other part;

Deed expressed to be supplemental to settlement, and to previous appointment of a new trustee.

And supplemental to an indenture of settlement, dated &c., and expressed to be made between [*parties*], and hereinafter referred to as the principal indenture; And also supplemental to an indenture dated the ——— day of ———, 18—, and expressed to be made between [*parties*], and hereinafter referred to as the supplemental indenture, being an appointment of the said [*continuing trustee*], to be a trustee of the principal indenture in the place of the said [*original trustee*], deceased:

Recitals: of death of tenant for life, &c.;

Whereas the said [*tenant for life*] died on the ——— day of ———, 18—, and [A. B.], an infant, is now the tenant in tail in possession of the messuages, lands and hereditaments comprised in and settled by the principal indenture:

of desire of retiring trustee to be discharged, &c.

And whereas [*recite desire of retiring trustee to be discharged, and of desire to appoint new trustee, ut ante*, p. 39].

Testatum.

NOW THIS INDENTURE WITNESSETH that for effectuating the said desire, the said [*continuing trustee*], and [*retiring trustee*], in exercise of the power in this behalf given to them by the

Appointment of new trustee.

principal indenture, and of every other power therein hereunto enabling, hereby appoint the said [*new trustee*], to be a trustee in the place of the said [*retiring trustee*], and to act jointly with the said [*continuing trustee*], for the purposes of the principal indenture. AND THIS INDENTURE ALSO WITNESSETH that the said [*continuing trustee*], and [*retiring trustee*], in pursuance of the direction in that behalf contained in the principal indenture, hereby grant, assign, and convey unto the said [*continuing trustee*] and [*new trustee*], their heirs and assigns, all such of the said messuages, lands, hereditaments, and premises comprised in and settled by the principal indenture, or which are by any means vested in the said [*continuing trustee*] and [*retiring trustee*], upon the trusts thereof, and which are of freehold or leasehold tenure (*e*). TO HOLD such of the said premises hereinbefore conveyed as are of freehold tenure, unto and to the use of the said [*continuing trustees*] and [*new trustee*], their heirs and assigns, and as to such of the same premises as are of leasehold tenure unto the said [*continuing trustees*] and [*new trustee*] absolutely, subject nevertheless to the leases and tenancies affecting the same premises respectively, AND upon the trusts and for the purposes of the principal indenture or such of the same as are now subsisting and capable of taking effect. AND THIS INDENTURE ALSO WITNESSETH that the said [*continuing trustee*] and [*retiring trustee*], in pursuance of the direction in that behalf contained in the principal indenture, hereby covenant with the said [*new trustee*] that they the said [*continuing trustee*] and [*retiring trustee*], or some or one of them, or their or his heirs, will forthwith, at the cost of the trust estate, well and effectually surrender into the hands of the lord or lady of the manor of

VI. Of Freeholds and Copyholds.

Grant of freeholds and assignment of leaseholds.

Covenant to surrender copyholds.

(*e*) If it is desired, the following words may be here added :—"TOGETHER with all rights, easements, and appurtenances thereto belonging or reputed to be held therewith, and all the estate, right, title, and interest of the said [*continuing trustees*] and [*retiring trustee*] in, to, or upon the same premises or any of them."

The insertion of an estate clause in a conveyance is now rendered unnecessary by sect. 63 of the Conveyancing and Law of Property Act, 1881, and the clause is usually omitted. See further on this point, sub tit. PURCHASE DEEDS in a subsequent volume of this Work.

VI. Of Freeholds and Copyholds.

———, according to the custom thereof, ALL SUCH of the said messuages, lands, hereditaments, and premises comprised in and settled by the principal indenture, or which are by any means vested in the said [*continuing trustee*] and [*retiring trustee*] upon the trust thereof, and which are of copyhold or customary tenure, TO THE USE of the said [*continuing trustee*] and [*new trustee*], their heirs and assigns, according to the custom of the said manor, and under and subject to the rents, conditions, and services due and of right accustomed for the same, and also subject to the tenancies affecting the same premises, but upon the trusts and for the purposes of the principal indenture, or of such of the same as are now subsisting and capable of taking effect. AND each of them, the said [*continuing trustee*] and [*retiring trustee*], so far as relates only to his own acts and deeds, hereby covenants with the said [*new trustee*] that they the said [*continuing trustee*] and [*retiring trustee*] respectively have not done, or knowingly permitted, or been party or privy to any act, deed, matter, or thing whatsoever, whereby the premises hereby granted and covenanted to be surrendered respectively are, is, or may be, impeached, charged, incumbered, or in any way affected, or whereby the said [*continuing trustee*] and [*retiring trustee*] respectively cannot, or ought not, to grant and covenant to surrender the same premises respectively in manner aforesaid. IN WITNESS, &c.

Covenant against incumbrances (*f*).

VII. APPOINTMENT *of a* NEW TRUSTEE *of a* TERM OF YEARS *created by an Indenture of Settlement of Real Estate.* (*By Endorsement.*)

Parties.

THIS INDENTURE, made the ——— day of ———, 18—, BETWEEN the within-named [*tenant for life and donee of*

(*f*) It has hitherto been usual for deeds of appointment of new trustees containing a conveyance of the trust property to contain also a covenant by the conveying parties that they have not incumbered. The statutory covenant implied by a conveyance by the old trustees "as trustees" does not appear to be here appropriate, as its effect would be to make the *continuing* trustees both covenantors and covenantees. See the first paragraph of sect. 7 of the Conveyancing Act, 1881. See further, as to the statutory covenants implied in conveyances, *post*, sub tit. PURCHASE DEEDS and sub tit. SETTLEMENTS.

the power nominated by the settlement], of the first part, [*continuing trustee*], of &c., of the second part, and [*new trustee*], of the third part: WHEREAS the within-named [*old trustee*] has been adjudicated a bankrupt by an order of the London Court of Bankruptcy, dated the ——— day of ———, upon a petition of bankruptcy filed in such Court: AND WHEREAS the said [*tenant for life*] is desirous of appointing the said [*new trustee*] to be a trustee in manner and for the purposes hereinafter mentioned: NOW THIS INDENTURE WITNESSETH that the said [*tenant for life*], in exercise of the power given to him by the combined operation of the Conveyancing and Law of Property Act, 1881, and of the within-written indenture, and of every other power him hereunto enabling, appoints the said [*new trustee*] to be a trustee of the term of ——— years created by the within-written indenture in the place of the said [*bankrupt trustee*], so adjudicated bankrupt as aforesaid: AND the said [*tenant for life*], with the assent of the said [*continuing trustee*], hereby declares that all the estate and interest hitherto vested in the said [*continuing trustee*] and [*bankrupt trustee*], of and in the messuages, lands, and hereditaments comprised in the within-written indenture, shall forthwith vest in the said [*continuing trustee*] and [*new trustee*] as trustees for the residue of the said term of ——— years, and as joint tenants, upon the trusts and for the purposes declared and contained of or concerning the same in the within-written indenture. IN WITNESS, &c.

VII. Of Term of Years.

Recitals: of bankruptcy of trustee (*n*);

of desire to appoint new trustee.

Testatum. Appointment of new trustee.

Vesting declaration.

VIII. *DEED of* APPOINTMENT *of a* NEW TRUSTEE *in the Room of a* RETIRING TRUSTEE *of a Will, where the Property consists of* MONEY INVESTED *on* MORTGAGE *and in the* FUNDS; *and* DECLARATION *of Trust by Continuing and New Trustee.*

THIS INDENTURE, made the ——— day of ———, BETWEEN [*retiring trustee*], of &c., of the first part, [*ap-*

Parties.

(*n*) As to bankruptcy constituting "unfitness" so as to cause a vacancy in the trusteeship, see *ante*, p. 11.

VIII. Where the Trust embraces Moneys on Mortgage and in the Funds.

pointor], of &c., of the second part, [*new trustee*], of &c., of the third part, and [*continuing trustee*], of &c., and the said [*new trustee*], of the fourth part: WHEREAS [*testator*], of &c., deceased, duly made and executed his will, dated the ——— day of ———, and thereby, after bequeathing certain legacies, devised and bequeathed all his real estate, and all the residue of his personal estate to the said [*trustees*], their heirs, executors, administrators, and assigns, upon trust to sell and convert the same into money, and invest the produce thereof as therein mentioned; and to hold the same upon the trusts in the said will mentioned; and he declared that the said [*appointor*] should during his life have the power to appoint new trustees of his said will; and the said testator appointed the said [*trustees*] executors of his said will: AND WHEREAS the said testator died on the ——— day of ———, 18—, without having revoked or altered his said will, which was duly proved by the executors therein named in the Principal Registry of Her Majesty's High Court of Justice, Probate Division, on the ——— day of ———: AND WHEREAS the said trustees sold and converted into money the said testator's real estate and the residue of his personal estate, and, out of the moneys arising therefrom, they advanced the sum of £——— to [*mortgagor*], of &c., on security of certain hereditaments situate in the parish of ———, in the county of ———, and which, by an indenture of mortgage, dated &c., were conveyed by way of mortgage unto and to the use of the said [*trustees*], their heirs and assigns, for securing the said principal sum and interest; and with the residue of the said trust moneys, the said [*trustees*] purchased the sum of £———, 3*l.* per Centum Consolidated Bank Annuities: AND WHEREAS the said [*retiring trustee*] is desirous of being discharged from the trusts of the said will; And the said [*appointor*] is desirous of appointing the said [*new trustee*] to be a trustee in the place of the said [*retiring trustee*]: AND WHEREAS it is intended that by an indenture of transfer of mortgage of even date with, and expressed to be made between &c., the same mortgage debt, and all securities for the same, shall be vested in the said [*continuing trustee*] and [*new trustee*], and that immediately after the execution of these presents the said sum of £———, 3*l.* per Centum Consolidated Annuities, shall be transferred into the

Recital of will;

of power to appoint new trustees;

of death of testator;

of proposed change of trustees;

of transfer of mortgage;

intended transfer of stock into the names of

joint names of the said [*continuing trustee*] and [*new trustee*]. NOW THIS INDENTURE WITNESSETH, that, in consideration of the premises, the said [*appointor*], in exercise of the power given to her by the combined operation of the said will and of the Conveyancing and Law of Property Act, 1881, and of every other power enabling her in this behalf, hereby appoints the said [*new trustee*], in the place of the said [*retiring trustee*] (*o*), to be a trustee of the will of the said [*testator*], and to act jointly with the said [*continuing trustee*], for the purposes of the said will. [AND the said [*continuing trustee*] and [*new trustee*] hereby declare that they and the survivor of them, and the heirs, executors or administrators of such survivor, shall and will stand and be possessed of, and interested in, the said trust premises as and when the same shall have been transferred and vested in them respectively as aforesaid, upon the trusts, and for the purposes, and with, under and subject to the powers, provisions and declarations expressed and contained in and by the said will, or such and so many of the same respectively as are now subsisting and capable of taking effect.] IN WITNESS, &c.

VIII. Where the Trust embraces Moneys on Mortgage and in the Funds.

continuing and new trustees.

Testatum.

Donee of power appoints new trustee.

Declaration of trust as to mortgage-moneys, &c.

IX. *CONDITIONAL NOMINATION of a* NEW TRUSTEE, *and Conveyance of* FREEHOLD ESTATES *to the Use of such New Trustee and the Continuing Trustees jointly, under a Clause in a Will, directing the Appointment of a New Trustee immediately upon the Death, &c. of any Trustee, it being* UNKNOWN *whether* ONE OF THE TRUSTEES *named in the Will is* LIVING OR DEAD.

THIS INDENTURE, made the ——— day of ———, BETWEEN [*donee of the power*], of &c., of the first part, [*continuing trustees*], of &c., of the second part, and [*new trustee*], of &c., of the third part: WHEREAS [*testator*], late of ———, deceased, duly made and executed his will dated

Parties.

Recital of will devising freeholds to trustees;

(*o*) This declaration, though frequently inserted, is no longer necessary, and may be omitted if desired.

IX. Where a Trustee is supposed to be Dead.

the ——— day of ———, and thereby devised the manors, messuages, lands and hereditaments hereinafter described unto and to the use of [*missing trustee*] and the said [*continuing trustee*], and their heirs, upon the trusts, and for the purposes in and by the said will declared and contained; And the said [*testator*] thereby declared that, in case any of the said [*missing and continuing trustees*], or any other trustee or trustees to be appointed in the place of the said [*missing and continuing trustees*], or any of them, under or by virtue of the now reciting power, should die, or desire to retire from, or refuse, or become incapable to act in the trusts of his said will, then and in every such case it should be lawful for the said [*tenant for life*], and, in case of his refusal or neglect so to do, within the space of one calendar month from the time of such trustee's dying, or refusing, or becoming incapable to act as aforesaid, then and in either of such cases, for the survivors or either of the said [*missing and continuing trustees*], or other trustee or trustees to be appointed in the place of them or any of them, as soon as conveniently might be, by deed, to appoint a trustee in the place of such trustee so dying, or refusing, or becoming incapable to act as aforesaid; And the said testator further directed, that, immediately upon every such nomination or appointment of a new trustee as aforesaid, the manors, messuages or tenements, lands and hereditaments so devised as aforesaid, should be vested in such new trustee jointly with such surviving or continuing trustee as aforesaid, upon the trusts and for the purposes of the said will: And whereas the said testator died on the ——— day of ———, without having revoked or altered his said will, which was duly proved by the executors therein named in &c., on the ——— day of ———, 18—: And whereas the said [*missing and continuing trustees*] accepted and acted in the trusts by the above-recited will so reposed in them as aforesaid: And whereas the said [*missing trustee*], in or about the month of ———, in the year ———, left this country, and went to Brazil, as he then stated, for a temporary purpose, and without having retired from, or declined to act in the trusts aforesaid: And whereas the said [*missing trustee*] has not since been heard of, and it is apprehended that he may be dead, and that thereby, in pursuance of the authority and directions so con-

—of power to change trustees;

of death of testator;

of acceptance of trusts;

that one trustee has gone abroad, and has not been heard of;

IX. Where a Trustee is supposed to be Dead.

tained in the above-recited will of the said [*testator*] as aforesaid, it may have become necessary to appoint a person to be a trustee in the room or stead of the said [*missing trustee*]: AND WHEREAS, the said [*tenant for life*], in pursuance of the above-recited authority, desires to appoint the said [*new trustee*] to be a trustee in the stead of the said [*missing trustee*] in case the said [*missing trustee*] has already (as is apprehended) departed this life: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said desire, and in exercise of the power in this behalf contained in the above-recited will of the said [*testator*], deceased, and of all other powers enabling him hereunto, the said [*tenant for life*] DOTH, by this present writing under his hand, nominate and appoint the said [*new trustee*] to be a trustee in the room or place of the said [*missing trustee*] jointly with the said [*continuing trustees*], upon the trusts and for all the purposes in and by the above-recited will declared, expressed, and contained, or such of the same respectively as are now subsisting and capable of taking effect: PROVIDED ALWAYS, and it is hereby declared, that this nomination and appointment is intended to take effect, and shall take effect, only in case the said [*missing trustee*] has departed this life before the date of these presents: AND THIS INDENTURE FURTHER WITNESSETH, that, for further effectuating the said appointment, and in obedience to the directions so as aforesaid contained in the said will, they the said [*continuing trustees*], hereby as trustees grant and convey unto the said [*new trustee*] and his heirs, ALL SUCH OF THOSE [*describe parcels*], and all such other freehold hereditaments, as are now vested in the said [*continuing trustees*] jointly by survivorship upon the decease of the said [*missing trustee*], as the only two surviving trustees of the above-recited will of the said [*testator*], deceased (*p*), together with all the rights, members, and ap-

intention to appoint a trustee in his place, if dead.

Testatum.

Tenant for life appoints new trustees.

Further *testatum.*

Continuing trustees release.

Parcels described with reference to an unknown event.

(*p*) By this mode of describing the parcels, the conveyance fails of effect altogether, unless the apprehended death of the missing trustee has actually happened, and thus a severance of the joint estate is prevented if the trustee is alive. A conveyance of the parcels, without this qualification, to the use of the missing trustee (if alive), jointly with the continuing trustees, and, if the missing trustee be dead, then to the use of the continuing and new trustees, would be erroneous; for (supposing the missing trustee not to be dead) the conveyance by his co-

IX. Where a Trustee is supposed to be Dead.

purtenances to the same manors, hereditaments, and premises belonging; To HOLD the manors, messuages, lands, hereditaments, and premises hereinbefore mentioned, and hereby conveyed unto the said [*new trustee*] and his heirs to the use of the said [*continuing trustees*] and [*new trustee*], their heirs and assigns; Upon the trusts and for the purposes in and by the above-recited will of the said [*testator*], deceased, declared, expressed, and contained, or such of the same respectively as are now subsisting and capable of taking effect. IN WITNESS, &c.

X. *APPOINTMENT of a* NEW "TRUSTEE *of a* SETTLEMENT" *created by* WILL *for the purposes of the* SETTLED LAND ACT, 1882, *where the original Trustees have been appointed by the Court.*

THIS INDENTURE, made the ——— day of ———,

Parties.

18—, BETWEEN [*surviving trustee*], of &c. and [*surviving trustee*], of &c., of the first part, [*tenant for life*], of &c., of the second part, and [*new trustee*], of &c., of the third part:

Recitals: of will;

WHEREAS [*testator*], late of &c., deceased, duly made and executed his will, dated &c., and thereby gave and devised all his messuages, lands and hereditaments, situate at &c., To the use of the said [*tenant for life*], without impeachment of waste, with divers remainders over, but the said will con-

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trustees would have severed the joint tenancy, and the subsequent limitation of their shares to the joint use of the three would be inoperative to create a joint tenancy in respect of the share left in the missing trustee; in other words, the estate would be in the singular condition of being held in common in two portions of one-third and two-thirds, the undivided two-thirds belonging to the three in joint tenancy. It is to be observed, that the above conveyance is only useful for the purpose of keeping alive the power of appointing new trustees, and of protecting the continuing trustees from any responsibility they might incur from their not exercising such power, in case it turned out that the trustee who had gone abroad was actually dead. In all other respects, the inconveniences resulting from the uncertainty as to the existence of such trustees, and the danger of dealing with the other trustees alone, remain undiminished. It may be added, that in case it should turn out that the absent trustee is alive, the acts of the fourth person, then apparently invested with the office, will be simply nugatory.

The above Precedent is retained from the last edition of this work, and may be found useful under special circumstances; but a new trustee may now be appointed in place of one who is known to have remained out of England more than twelve months.

X. For purposes of Settled Land Act, 1882.

tained no power of sale of the lands thereby settled: AND WHEREAS the said [*testator*] died on the ——— day of ———, 18—, without having revoked or altered his said will, and seised in fee simple in possession of the said hereditaments and premises thereby devised: AND WHEREAS by an order of the Chancery Division of Her Majesty's High Court of Justice, made on the ——— day of ——— 18—, by Sir A. B., one of the Justices of the said Court, upon the application of the said [*tenant for life*], the said [*surviving trustees*] and [*deceased trustee*], late of &c., deceased, were appointed to be trustees of the settlement created by the said will within the meaning and for the purposes of the Settled Land Act, 1882: AND WHEREAS the said [*deceased trustee*] died on the ——— day of ———, 18—: AND WHEREAS the said [*continuing trustees*] are desirous of appointing the said [*new trustee*] to be a trustee in the place of the said [*deceased trustee*], and the said [*tenant for life*] has consented to such appointment: NOW THIS INDENTURE WITNESSETH that, for effectuating the said desire the said [*continuing trustees*], in exercise of the power given to them by the Conveyancing and Law of Property Act, 1881, and of every other power them hereunto enabling, do hereby, with the consent and approbation of the said [*tenant for life*] (testified by his executing these presents), appoint the said [*new trustee*] to be a trustee of the settlement created by the said will within the meaning of the Settled Land Act, 1882, in the place of the said [*deceased trustee*], deceased as aforesaid, and to act jointly with them the said [*continuing trustees*], for the purposes of the said Act lastly hereinbefore mentioned (*q*). IN WITNESS, &c.

of appointment of trustees by the Court;

of death of trustee;

of desire to appoint new trustee.

Testatum.

Appointment of new trustee.

(*q*) As to the powers of trustees appointed by the Court, see *ante*, p. 19.

Although in the present case the appointment of the new trustee may not be regarded as an exercise by the trustees of a "power conferred by the settlement exerciseable for a purpose provided for by this Act," so as to render the consent of the tenant for life absolutely necessary under sect. 56 (2) thereof, yet it is highly desirable, having regard to the scope and spirit of the Act, that such consent should be obtained and evidenced by his concurrence in the deed of appointment. If the tenant for life is an infant, the concurrence of his guardians will not be required (sect. 60); if the tenant for life is a married woman not entitled for her separate use, she and her husband should both concur, and the deed should be acknowledged. See *ante*, Vol. I. p. 210, sub tit. ACKNOWLEDGMENTS; and where there is a lunatic

XI. *APPOINTMENT by a Sole Trustee of a* SOLE SEPARATE TRUSTEE *of a distinct Share of the Real Estate devised by a Will.*

THIS INDENTURE, made the ——— day of ———,
Parties. 18—, BETWEEN [*old trustee*], of &c., of the one part, and
Recitals: of will; [*new trustee*], of &c., of the other part: WHEREAS [*testator*], late of &c., deceased, duly made and executed his will dated the ——— day of ———, 18—, and thereby, after bequeathing the several specific and pecuniary legacies therein mentioned, gave, devised, and bequeathed all his real estate and all the residue of his personal estate unto the said [*old trustee*], upon the trusts therein mentioned, during the life of [*wife*] his wife, and from and after her decease upon trust for the benefit of [*daughter*], his only daughter, and her issue therein mentioned respectively, and from and after the decease of the said [*daughter*], and such default or failure of her issue as therein mentioned, as to the freehold messuage or farmhouse and hereditaments hereinafter described, upon trust to sell the same and to hold the proceeds of such sale upon trust for the benefit of the testator's brother A. B., and his issue as in the said will is mentioned, and as to all other the real and personal property of the testator, upon the trusts therein declared of and concerning the same: AND the said [*testator*], by his said will appointed the said [*old trustee*] to be the sole
of death of testator; trustee and executor thereof: AND WHEREAS the said [*testator*] died on the ——— day of ———, 18—, and his will was duly proved by the said [*old trustee*] in the district registry at ——— of the Probate Division of Her Majesty's
of death of daughter; High Court of Justice: AND WHEREAS the said [*daughter*] died on the ——— day of ———, an infant and unmarried: AND WHEREAS the said [*wife*] died on the ——— day of
that no donee of power was nominated; ———, 18—: AND WHEREAS no person is nominated by the said will to appoint trustees thereof after the death of the
of desire to appoint. said [*daughter*]: AND WHEREAS the said [*old trustee*] is desirous of appointing the said [*new trustee*] to be a separate trustee of the said messuage or farmhouse and premises now

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tenant for life, his committee should concur in his behalf. The limitations of the will must, of course, be recited sufficiently to show who is the tenant for life. As the "trustees of the settlement" take no estate or interest in the property, no vesting declaration or conveyance to them is necessary or proper.

so held as aforesaid on trusts distinct from those relating to any other part of the trust property devised and bequeathed by the said will: NOW THIS INDENTURE WITNESSETH that the said [*old trustee*], in exercise of every statutory or other power enabling in this behalf, hereby appoints the said [*new trustee*] to be trustee of the said will of the said [*testator*], so far only as regards the said messuage or farmhouse and premises hereinafter described and expressed to be hereby conveyed, and by the said will so devised as aforesaid, upon trust for the benefit of the said A. B. and his issue: AND THIS INDENTURE ALSO WITNESSETH that in consideration of the premises the said [*old trustee*], as trustee, hereby grants and conveys unto the said [*new trustee*], ALL THAT freehold messuage or farmhouse with the outbuildings and the several closes or pieces of land, known as ——— Farm, situate in the parish of ———, in the county of ———, and containing by admeasurement ——— acres ——— roods and ——— poles or thereabouts, and bounded &c., and now in the occupation of ———, To HOLD the same unto and to the use of the said [*new trustee*], his heirs and assigns, upon the trusts and for the purposes by the said will declared of and concerning the same, or such of the said trusts and purposes as are now subsisting and capable of taking effect. IN WITNESS, &c.

XI. Of Sole Separate Trustee of a distinct Share.

Testatum. Appointment of new trustee.

Grant of freeholds, being part of trust property.

XII. *APPOINTMENT of* SEPARATE SETS *of* TRUSTEES *of* DISTINCT *parts of* PERSONALTY *by the* PERSONAL REPRESENTATIVE *of the last surviving Trustee.* VESTING DECLARATION.

THIS INDENTURE, made the ——— day of ———, 18—, BETWEEN [*representative of last surviving trustee*], of the first part; E. D. [*tenant for life of one share*], the wife of F. D., of &c., and the said F. D., of the second part; [*new trustee of first share*], of &c., and [*other new trustee of first share*], of &c., of the third part, and [*new trustee of second share*], of &c., and [*other new trustee of second share*], of &c., of the fourth part: WHEREAS [*testator*], late of &c., deceased, duly made and executed his will dated the ———

Parties.

Recitals: of will of testator;

XII. Of separate Sets of Trustees of distinct Shares.

day of ———, 18—, and thereby gave, devised and bequeathed all the residue of his real and personal estate and effects after and subject to the payment thereout of his personal and testamentary expenses and debts, and of the specific and pecuniary legacies and annuities therein respectively mentioned, unto and to the use of [*trustees*], according to the tenure or nature of the same premises respectively, upon trust to sell and convert the same into money, and to invest the proceeds of such sale and conversion as therein mentioned, and to stand possessed of such investments and of the dividends and income thereof, as to one equal moiety or half part thereof, upon trust for his son C. B. during his life, and after his death for the benefit of the issue of his said son, with remainders over as therein mentioned; and as to the other equal moiety or half part of the said trust premises upon trust for his daughter E. D. during her life, and from and after her decease for the benefit of her husband F. D. and her issue, with remainders over as in the said will is mentioned, and said [*testator*] thereby appointed [*trustees*] to be the executors thereof: And whereas the said [*testator*] duly made and executed two several codicils dated respectively the ——— day of ———, 18—, and the ——— day of ———, 18—, to his said will, and thereby gave certain specific and pecuniary legacies, but did not otherwise alter his said will: And whereas the said [*testator*] died on the ——— day of ———, 18—, without having revoked or altered the said will, except so far as the same was altered by the said codicils, and the said will and codicils were on the ——— day of ———, 18—, proved in the Principal Registry of Her Majesty's High Court of Justice, Probate Division, by the said [*trustees*]: And whereas the funeral and testamentary expenses and debts of the said [*testator*], and the legacies bequeathed by his said will and codicils have long since been fully paid and satisfied, and all the annuities given by the said will have ceased by the deaths of the respective annuitants: And whereas the real and personal estate of the said [*testator*] was sold and converted into money, and the proceeds of such sale and conversion, after making thereout the payments aforesaid, were invested in manner directed by his said will, and the present investments of the same trust premises are specified in the schedule here-

of codicils;

of death of testator and probate of will;

of payment of funeral expenses, &c.;

of sale and conversion of testator's estate;

XII. Of separate Sets of Trustees of distinct Shares.

under written: And whereas the said [*one of the original trustees*] died on the ——— day of ———, 18—: And whereas the said [*testator's son* C. B.] died &c., leaving issue him surviving two sons and three daughters, namely, &c., all of whom are now living, being infants and unmarried: And whereas the said [*last surviving trustee*] died on the ——— day of ———, 18—, having by his will (which was duly proved in the District Registry at ——— of the Probate Division aforesaid) appointed the said [*representative*] to be the sole executor thereof [*or* And whereas the said [*last surviving trustee*] died &c., intestate, and letters of administration to his estate and effects were on the ——— day of ———, 18—, granted to the said [*representative*] in the District Registry, &c.]: And whereas the investments specified in the first part of the said schedule, forming one equal moiety or half share of the trust premises now subject to the trusts of the said will, have been allotted as is by the said will provided and appropriated, to be held upon the trusts in the said will declared, for the benefit of the issue of the said C. B., deceased, with remainders over; and the investments specified in the second part of the said schedule, forming the other moiety or half share of the said trust premises, have been allotted as aforesaid and appropriated, to be held upon the trusts in the said will declared for the benefit of the said E. D. and F. D., her husband, and of her issue, with remainders over: And whereas the said [*representative, tenant for life and her husband*], respectively, are desirous that separate trustees shall be appointed of the several parts of the trust premises so held on trusts distinct from those relating to the other parts of the said trust premises as hereinbefore is mentioned: NOW THIS INDENTURE WITNESSETH that the said [*representative*], in exercise of the power in this behalf given to him by the joint operation of the Conveyancing and Law of Property Act, 1881, and of the Conveyancing Act, 1882, and of every other power him hereunto enabling, with the consent of the parties of the second part testified by their respective execution of these presents, hereby appoints the said [*trustees of first share*] to be the trustees of the said will so far as relates to the one equal moiety or half share of the said trust premises so directed by the

of death of testator's son;

of death of last surviving trustee;

of appropriation of trust property;

of desire to appoint separate sets of trustees.

Testatum.

Appointment of two sets of trustees.

XII. Of separate Sets of Trustees of distinct Shares.

said will to be held as aforesaid upon trust for the benefit of the said C. B., deceased, and his issue, with remainders over; and also appoints the said [*trustees of second share*] to be the trustees of the said will so far as relates to the one other equal moiety or half share of the said trust premises so directed by the said will to be held as aforesaid for the benefit of the said E. D., and F. D., her husband, and of her issue, with remainders over; and the said [*trustees*] respectively hereby consent to act as and be trustees of the said will so far as relates to the several parts of the trust premises so held on distinct trusts as aforesaid:

Vesting declaration.

And the said [*representative*] with the assent of the said [*tenant for life and her husband*] hereby declares that all the estate and interest of him the said [*representative*] in the said trust premises, and the investments thereof specified in the said schedule hereunder written, and the right to recover and receive all debts and things in action, subject to the trusts of the said will, shall vest in the persons and in manner hereinafter mentioned, that is to say: so far as relates to the one equal moiety or half part of the said trust premises so directed by the said will to be held as aforesaid for the benefit of the said C. B., deceased, and his issue, with remainders over, and the several investments representing that moiety, and which are specified in the first part of the said schedule, in the said [*trustees of the first share*] as joint tenants, for the purposes of the trusts by the said will declared of the same moiety; and so far as relates to the other one equal moiety or half part of the said trust premises so directed by the said will to be held as aforesaid for the benefit of the said [*tenant for life*], and E. D., her husband, and her issue, with remainders over, and the several investments representing that moiety, and which are specified in the second part of the said schedule, in the said [*trustees of second share*] as joint tenants, for the purposes of the trusts by the said will declared of such last-mentioned moiety. In witness, &c.

The Schedule above referred to.

XIII. *APPOINTMENT of a* NEW TRUSTEE *of a* WILL *in the Room of one who has* DISCLAIMED *where the Estate has not been realized, the Number of Trustees being reduced.*

THIS INDENTURE, made the ——— day of ———, 18—, BETWEEN [*appointor*], of &c., of the first part; [*acting trustee*], of &c., of the second part, and [*new trustee*], of &c., of the third part: WHEREAS [*recite will creating the trust, death of testator and probate*]: AND WHEREAS the said [*one of the trustees appointed by the will*] died in the lifetime of the said [*testator*] deceased: AND WHEREAS the said [*disclaiming trustee*] renounced probate of the said will, and refused to act in the trusts thereof, and has not in any way interfered in the administration of the estate and effects of the said [*testator*] or in the execution of the trusts of the said will: AND WHEREAS the said [*disclaiming trustee*] by a deed poll under his hand and seal dated the ——— day of ———, 18—, disclaimed [*recite operative part of deed of disclaimer*]: AND WHEREAS the estate of the said [*testator*], deceased, has not yet been fully got in, nor have his debts nor the legacies given by his said will been paid or satisfied: AND WHEREAS the said [*appointor*] is desirous of appointing the said [*new trustee*] to be a trustee of the said will in the place of the said [*disclaiming trustee*] so disclaiming as aforesaid; but it is not intended at present to appoint any person in the place of the said [*trustee*], so deceased as aforesaid, in the lifetime of the said [*testator*], deceased, to be a trustee of the said will: NOW THIS INDENTURE WITNESSETH that the said [*appointor*] in exercise of the power in this behalf given to him by the said will, and of every other power him hereunto enabling, hereby appoints the said [*new trustee*] to be a trustee of the said will in the place of the said [*disclaiming trustee*], and the said [*new trustee*] consents to be a trustee of the said will accordingly: And the said [*appointor*] declares that, &c. [*Vesting declaration, ut ante*, p. 37.] PROVIDED ALWAYS that nothing herein contained shall be taken as an assent by the said [*continuing trustee*] as executor, or so as in any wise to affect his rights or powers as executor of the said will with respect to getting in or administering the estate and effects of the said [*testator*], deceased, or otherwise howsoever in relation thereto. IN WITNESS, &c.

Parties.

Recitals: of will; of death of a trustee; of renunciation of probate, &c. by disclaiming trustee; of disclaimer; of administration of estate; of desire to appoint trustee.

Testatum.

Appointment of trustee.

Saving rights of continuing trustee as executor.

XIV. *RETIREMENT and* Discharge *of a* Trustee, *and* Declaration vesting *the Trust Property in the Continuing Trustees (by Supplemental Deed).*

Parties.

THIS INDENTURE, made the —— day of ———, 18—, Between [*appointor*], of &c., of the first part, [*retiring trustee*], of &c., of the second part, and [*continuing trustee*], of &c., and [*other continuing trustee*], of &c., of the third part,

Deed expressed to be supplemental to settlement, and deeds of appointment of new trustees.

and supplemental to an indenture of settlement dated &c., and made between &c., and hereinafter referred to as "the principal indenture" (being a settlement made previously to the marriage then intended, and shortly afterwards solemnized between the said [*appointor*] and [*wife*], his wife): And also supplemental to another indenture dated &c., and made between &c., which last-mentioned indenture is itself supplemental to the principal indenture, and is hereinafter referred to as "the first supplemental indenture" (being an appointment of the said [*retiring trustee*] to be a trustee of the principal indenture in the place of A. B. deceased): And also supplemental to another indenture dated &c., and made &c., which last-mentioned indenture is also itself supplemental to the principal indenture and to the first supplemental indenture, and is hereinafter referred to as "the second supplemental indenture" (being an appointment of the said [*continuing trustee*] to be a trustee of the said principal indenture in the place of C. D., also deceased):

Death of wife.

Whereas the said [*wife*] died on the ——— day of ———, 18—:

Of sale of part of trust property;

And whereas since the date of the second supplemental indenture the said [*retiring trustee*] and [*continuing trustees*] have, with the consent of the said [*appointor*], in execution of the trusts, and in pursuance of the directions contained in the principal indenture, sold the messuage and hereditaments situate at ——— mentioned in the principal indenture, and being part of the property thereby settled, and have invested the proceeds of the said sale in the purchase in their joint names of £——— Debenture Stock of the ——— Railway:

of present state of trust property.

And whereas the several stocks, shares and other investments now subject to the trusts of the principal indenture are particularly set forth in the schedule hereunder written:

And whereas the said [*retiring trustee*] is desirous of being discharged from the trusts of the prin-

cipal indenture: AND WHEREAS the said stocks, shares and other investments mentioned in the said schedule have already been transferred into the names of the said [*continuing trustees*] alone: NOW THIS INDENTURE WITNESSETH that the said [*retiring trustee*] hereby declares that he is desirous of being discharged from the trusts of the principal indenture: And the said [*continuing trustees*] and [*appointor*] hereby consent to the discharge of the said [*retiring trustee*] from the trusts aforesaid, and to the vesting in the said [*continuing trustees*] alone of the trust property; AND the said [*appointor*] accordingly declares that all chattels subject to the trusts of the principal indenture, and the right to recover all debts or other things in action so subject, shall forthwith vest in the said [*continuing trustees*] alone as trustees of the principal indenture, and as joint tenants upon the trusts, and for the purposes of the same. IN WITNESS, &c.

XIV. Retirement and Discharge of Trustee.

Testatum.

Declaration of desire to be discharged, &c.

Vesting declaration.

THE SCHEDULE ABOVE REFERRED TO.

XV. *TRANSFER of* BONDS *of a* RAILWAY COMPANY *on* APPOINTMENT *of a* NEW TRUSTEE (*r*).

WE [*continuing trustee*], of &c., and [*retiring trustee*], DO HEREBY TRANSFER to the said [*continuing trustee*] and [*new trustee*], of &c., their executors, administrators and assigns ——— several BONDS, numbers ——— and ——— respectively, made by "The ——— Railway Company," bearing date the ——— day of ———, 18—, for securing the sums of £——— and £——— respectively, and interest thereon

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(*r*) This Precedent is adapted, with slight variation, from the form of transfer given in Schedule E. to the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 17). By sect. 45 of that Act it is provided that a register of mortgages and bonds issued by the company shall be kept by the secretary, and by sect. 46 that "any party entitled to such mortgage or bond may from time to time transfer his right and interest therein to any other person; and every such transfer shall be by deed duly stamped, wherein the consideration shall be truly stated; and every such transfer may be according to the form in the Schedule E. to this Act annexed, or to the like effect."

As to assignment of personalty by a person directly to himself and another, see *ante*, p. 31.

XV. Transfer of Bonds.

respectively after the rate of £——— per centum per annum, and all our right, estate and interest in the money thereby secured.

XVI. *CONVEYANCE of* FREEHOLD COTTAGES *and* LAND *vested in the old continuing* TRUSTEES *of a* CHAPEL *belonging to a Body of* PROTESTANT DISSENTERS, *on the* APPOINTMENT *of* NEW TRUSTEES *under Sir Morton Peto's Act* (*s*). (*By Deed supplemental to the Original Conveyance in Trust.*)

THIS INDENTURE, made the ——— day of ———, 18—, BETWEEN [*continuing trustees, giving names and descrip-*

Parties.

Sir M. Peto's Act.

(*s*) The statute 13 & 14 Vict. c. 28, commonly known as Sir Morton Peto's Act, and intituled "An Act to render more simple and effectual the Titles by which Congregations or Societies for Purposes of Religious Worship or Education in England and Ireland hold Property for such Purposes," enacts that "Wherever freehold, leasehold, copyhold, or customary property in England or Wales has been or hereafter shall be acquired by any congregation or society or body of persons associated for religious purposes or for the promotion of education, as a chapel, meeting-house, or other place of religious worship, or as a dwelling-house for the minister of such congregation, with offices, garden, and glebe, or land in the nature of glebe, for his use, or as a school-house, with schoolmaster's house, garden, and playground, or as a college, academy, or seminary, with or without grounds for air, exercise, or recreation, or as a hall or rooms for the meeting or transaction of the business of such congregation or society or body of persons, and wherever the conveyance, assignment, or other assurance of such property has been or may be taken to or in favour of a trustee or trustees to be from time to time appointed, or of any party or parties named in such conveyance, assignment, or other assurance, or subject to any trust for the congregation or society or body of persons, or of the individuals composing the same, such conveyance, assignment, or other assurance shall not only vest the freehold, leasehold, copyhold, or customary property thereby conveyed or otherwise assured in the party or parties named therein, but shall also effectually vest such freehold, leasehold, copyhold, or customary property in their successors in office for the time being and the old continuing trustees, if any, jointly, or if there be no old continuing trustees, then in such successors for the time being wholly, chosen and appointed in the manner provided or referred to in or by such conveyance, assignment, or other assurance, or in any separate deed or instrument declaring the trust thereof, or if no mode of appointment be therein set forth, prescribed, or referred to, or if the power of appointment be lapsed, then in such manner as shall be agreed upon by such congregation or society or body of persons, upon

tions], of the one part, and [*new trustees, giving names and descriptions*], of the other part; And supplemental to an

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such and the like trusts, and with, under, and subject to the same powers and provisions, as are contained or referred to in such conveyance, assignment, or other assurance, or in any such separate deed or instrument, or upon which such property is held, and that without any transfer, assignment, conveyance, or other assurance whatsoever, anything in such conveyance, assignment, or other assurance, or in any such separate deed or instrument, contained to the contrary notwithstanding: Provided always, that in case of any appointment of a new trustee or trustees of or the conveyance of the legal estate in any such property being made as heretofore was by law required, the same shall be as valid and effectual to all intents and purposes as if this Act had not been passed."

Deed expressed to be supplemental.

Sect. 2 provides for payment in lieu of fines on death or alienation in respect of property of copyhold or customary tenure.

Sect. 3. "And be it enacted, that for the purpose of preserving evidence of every such choice and appointment of a new trustee or new trustees, and of the person or persons in whom such charitable estates and property shall so from time to time become legally vested, every such choice and appointment of a new trustee or new trustees shall be made to appear by some deed under the hand and seal of the chairman for the time being of the meeting at which such choice and appointment shall be made, and shall be executed in the presence of such meeting, and attested by two or more credible witnesses, which deed may be in the form or to the like effect of the schedule to this Act annexed, or as near thereto as circumstances will allow, and may be given and shall be received as evidence in all Courts and proceedings in the same manner and on the like proof as deeds under seal, and shall be evidence of the truth of the several matters and things therein contained."

Appointment of new trustees to be made to appear by deed in form in schedule, which shall be received in evidence as a deed under seal.

By sect. 4, this Act is to extend to Ireland.

Ireland.

The following is the schedule to which the Act refers:—

"Memorandum of the choice and appointment of new trustees of the [*describe the chapel, school, or other buildings and property*] situate ——— in the parish [*or* township] of ——— in the county [*riding, division, city, or place*] of ——— at a meeting duly convened and held for that purpose [*in the vestry of the said chapel*] on the [25th] day of [*April*, 1850], A. B. of ——— chairman.

Names and descriptions of all the trustees on the constitution or last appointment of trustees made the ——— day of ———.

Adam Bell, of ———.
Charles Dixon, of ———.
Edward Foster, of ———.
George Hurst, of ———.
John Jackson, of ———.
K. Lucas, of ———.
Mathew Norman, of ———.
Octavius Parker, of ———.

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indenture dated &c., and made between [*parties*] which indenture is hereinafter referred to as "the principal inden-

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Names and descriptions of all the trustees in whom the said [*chapel*] and premises now legally become vested.

First—old continuing trustees :—

John Jackson, now of ———.
Mathew Norman, now of ———.
Octavius Parker, now of ———.

Second—new trustees now chosen and appointed :—

Benjamin Adams, of ———.
Charles Bell, of ———.
Jonathan Edmunds, of ———.
Richard Baxter, of ———.
John Home, of ———.

Dated this ——— day of ———.

William Hicks, (L.S.)
Chairman of the said Meeting.

Signed, sealed and delivered by the said *William Hicks* as chairman of the said meeting, at and in the presence of the said meeting, on the day and year aforesaid, in the presence of

C. D.
E. F.

[*The blanks, and parts in italics, to be filled up as the case may be.*]"

Effect of the Act.

This Act dispenses, on the appointment of new trustees, with the necessity of a conveyance of any property belonging to the trust which comes under any of the several categories of a chapel, minister's house, glebe, or land in the nature of glebe, schoolhouse, college, or meeting-hall, and the appurtenances thereto respectively; other trust property not coming under these categories must be conveyed in the ordinary way. The cottages, &c. referred to in the above Precedent form part of the endowment of the chapelry, having been, as is frequently the case, given or devised to the trustees for that purpose, and would not seem to be included under the head of "glebe, or land in the nature of glebe," inasmuch as the minister has no legal or equitable estate or interest in the lands, nor are the rents and profits wholly or in part necessarily applicable for his remuneration or benefit.

The effect of the Act, as regards the appointment of new trustees, would seem to be that the choice and appointment may be made in any way which may be prescribed by the deed of settlement or other instrument creating the trust, or if no mode of appointment be thus prescribed, or if the power has lapsed, then in such manner as the congregation, society or body may determine, but such choice and appointment, however made, *must* be evidenced in the manner prescribed by the Act, *i. e.*, by a deed under the hand and seal of the chairman of the meeting of the electing body, whether of the Church or Congregation, or merely (as it would seem) of the surviving trustees, and

ture," (being a conveyance of the several cottages, closes of land and hereditaments hereinafter described and expressed to be hereby conveyed to the then trustees of the ——— Chapel at ———, in the county of ———): WHEREAS A. B. mentioned in the principal indenture died on the ——— day of ———, 18—: AND WHEREAS C. D. men- XVI. Conveyance of Land to Trustees of Chapel. Recitals of deaths, &c. of trustees;

executed in the presence of such meeting; and such deed *may* be in the form or to the effect of the schedule to the Act. The modes of appointment of trustees vary considerably among the different bodies of Nonconformists, being sometimes vested in the continuing or surviving trustees, sometimes in the "Congregation" or general body of persons habitually attending the particular chapel, sometimes in the "Church" or esoteric body of persons who have attained full membership of the society, by going through some special rite or ceremony, such as adult baptism in the case of the Baptists. The conditions under which these meetings are to be convoked and held are so various, that it has not been thought worth while to give any precedent of an appointment of trustees of chapels other than that given in the schedule to Sir M. Peto's Act.

The simplest course seems to be to evidence the appointment by deed, as nearly as possible following the form in the schedule, and to convey to the trustees any property not being within the Act by a separate deed, as in the text.

The provisions of this Act are not applicable to the appointment of trustees of a Wesleyan chapel, as, by the constitution of Wesleyan Methodism such trustees are not merely trustees of the particular chapel, but form part of the governing body of the district in which the chapel is situated: *Re Houghton Chapel*, 2 W. R. 631.*

A lease for the purpose of a chapel under this Act is a lease for a charitable purpose, and must be enrolled under the Mortmain Act, 9 Geo. 2, c. 36: see *Bunting* v. *Sargent*, 13 Ch. D. 330. But where land is already in mortmain, a conveyance such as that in the text does not require enrolment: *Ashton* v. *Jones*, 30 Beav. 460. Enrolment.

* By the "Model Trust Deed" the appointment of new trustees of Wesleyan chapels, &c., is to be conducted as follows: the superintendent preacher of the circuit is to nominate at a meeting of the continuing trustees a number of persons, being Methodists (of that circuit, if possible, or otherwise of neighbouring circuits), not fewer than twice the number of trustees to be chosen, and from among the persons so nominated the continuing trustees are to appoint the number of new trustees required to fill up the vacancies; if there are no continuing trustees, the superintendent is to appoint; and upon the appointment being made, the chapel or other property is to be conveyed to the new and continuing trustees jointly, or to the new trustees alone, as the case may require. Wesleyan Methodists.

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tioned in the principal indenture resigned his trusteeship of the said ——— Chapel on the ——— day of ———, 18—: And whereas [*recite deaths, &c.*]: And whereas the said [*new trustees*] were on the ——— day of ———, 18—, at a meeting of the church [*or* congregation], duly convened and held for the purpose in the vestry of the said chapel in accordance with the provisions of the deed of settlement of the said chapel, chosen and appointed to be the trustees conjointly with the said [*old trustees*] of the said chapel, and of the minister's house and garden thereto belonging, and of the school-house and school premises appertaining to or connected with the said chapel, as appears by a memorandum of such choice and appointment dated the ——— day of ——— aforesaid, and under the hand and seal of G. H., as chairman of the said meeting, and in the presence thereof: NOW THIS INDENTURE WITNESSETH that, for the purpose of effectually vesting the said cottages, closes of land and premises hereinafter described in the trustees so chosen and appointed, conjointly with the old continuing trustees of the said chapel, and in consideration of the premises, they the said [*old trustees*] hereby grant and convey unto the said [*new trustees*], their heirs and assigns, all and singular the said cottages, closes of land and premises situate at ——— aforesaid, and particularly described in the principal indenture, and thereby expressed to be granted and conveyed: To hold the same premises unto and to the use of the said [*old and new trustees*], their heirs and assigns, upon the trusts, for the purposes, and with and subject to the powers, provisoes and declarations in the principal indenture declared and contained, or upon, for, with and subject to which the said premises ought henceforth to be held in accordance with or by virtue of the provisions of the said deed of settlement or otherwise: And each of the said [*old trustees*], so far as relates only to his own acts and deeds [*covenant against incumbrances, ante*, p. 44]. In witness, &c.

of choice and appointment of new trustees.

Testatum.

Conveyance of cottages, &c. by old trustees to new trustees jointly with themselves.

Habendum upon trusts of deed of settlement.

Covenant against incumbrances.

APPRENTICESHIP.

PRELIMINARY REMARKS.

Nature and Incidents of Apprenticeship.

The relation of master and apprentice.

THE relation of master and apprentice (a term derived from the French verb *apprendre*, to learn) arises where one person contracts with another, in consideration for service rendered, to *teach* that other some trade, craft, or mystery for a specified period. An express or implied engagement on the part of the master to *teach*, so that the servant may maintain an action if the master should fail to teach, is of the essence of a contract of apprenticeship, and distinguishes such contract from a contract for mere hiring and service. It was formerly laid down that to constitute a contract of apprenticeship the word "apprentice" must be used; *R.* v. *Bolton*, Cald. 369; but it is now settled that no technical words are necessary to constitute the relation of master and apprentice, provided that the words used sufficiently indicate the intention of the parties: *R.* v. *Rainham*, 1 East, 531; *R.* v. *Mountsorrel*, 2 M. & S. 460; *R.* v. *King's Lynn*, 6 B. & C. 97. See also Addison on Contracts, 453 *et seq.* It must, however, appear that teaching on the part of the master, and learning on the part of the apprentice, is the *primary purpose* of the contract: *R.* v. *Crediton*, 2 B. & Al. 493.

The common law required all contracts of apprenticeship to be by deed, and to be discharged by deed. As the period of apprenticeship always exceeds one year, the contract is within the Statute of Frauds, sect. 4, and consequently must be in writing, and be signed by the party to be charged therewith. See *ante*, Vol. I., p. 272, tit. AGREEMENTS. By the stat. 5 Eliz. c. 4, sect. 25, contracts of apprenticeship were required to be made by indenture, subject to certain rules and regulations therein laid down; but this

Nature and Incidents of Apprenticeship.

enactment was repealed by sect. 2 of the stat. 54 Geo. 3, c. 96, which enacts that:—

"It shall and may be lawful for any person to take or retain or become an apprentice though not according to the provisions of the said Act; and that indentures, deeds and agreements in writing entered into for that purpose, which would be otherwise valid and effectual, shall be valid and effectual in law, the repeal of so much of the said Act as is herein last above recited notwithstanding."

Contracts of apprenticeship are, however, usually made by indenture, and it is said that such contracts, in order to bind infants, must be by indenture and executed by themselves. See Macpherson on Infants, 479.

Apprenticeship, when necessary.

The only case in which apprenticeship is now necessary to the exercise of a profession or business is that of a solicitor. By the Solicitors Act, 1843 (6 & 7 Vict. c. 73), sect. 3, it is provided that no person is to be admitted a solicitor, unless he "shall have been bound by a contract in writing to serve as clerk for and during the term of five years to a practising attorney or solicitor in England or Wales, and shall have duly served under such contract for and during the said term of five years." By sect. 4, no solicitor is to have more than two such articled clerks, or to take or retain any clerk after discontinuing business, or whilst clerk to another; and by sect. 6, persons bound for five years may serve one of such years with a practising barrister, or special pleader, or with the London agent of the solicitor to whom any such person shall be bound. This period is reduced to three years in the case of a person who has taken the degree of bachelor of arts or bachelor of laws in the University of Oxford, Cambridge, Dublin, Durham or London, or in the Queen's University in Ireland, or the degree of bachelor of arts, master of arts, bachelor of laws or doctor of laws in any of the Universities of Scotland: and persons having been at the bar may also be admitted after three years' service. See Solicitors Act, 1860 (23 & 24 Vict. c. 127), sects. 2, 3. And by the Solicitors Act, 1877 (40 & 41 Vict.

c. 25), sect. 12, barristers of not less than five years' standing are entitled on being disbarred, and passing the final examination, to be admitted without serving as articled clerks.

Nature and Incidents of Apprenticeship.

But contracts of apprenticeship, though not necessary, are often entered into by persons proposing to exercise callings other than that of a solicitor, and numerous statutes have from time to time been passed for the purpose of regulating such contracts (*a*).

An ordinary contract of apprenticeship consists of three parts, viz.:—first, the binding of the apprentice; secondly, covenants by the apprentice, and (if he is an infant) by his father or guardian for the due performance of his service; and thirdly, covenants by the master to teach and instruct the apprentice in the business.

Parties to articles of apprenticeship.

Contracts of service, whether by way of apprenticeship or merely by way of hiring, are generally presumed to be for the benefit of infants who enter into them (*b*), and are accordingly held to be valid and binding upon the infants. See *Cornwall* v. *Hawkins*, 20 W. R. 653; *Cooper* v. *Simmons*, 7 H. & N. 707; *S. C.*, 31 L. J., M. C. 138. As to what is sufficient execution by the infant, see *Rex* v. *Longnor*, 4 B. & Ad. 649. It is usual to make the father or guardian of an infant a party to an indenture of apprenticeship, to guarantee the performance by the apprentice of his obligations. The father has, how-

(*a*) See as to apprentices to city companies, 22 Hen. 8, c. 4; as to apprenticeship to sea service, see 17 & 18 Vict. c. 104, ss. 141—145. The employment of children in factories is regulated by 41 & 42 Vict. c. 16. Poor-law guardians have the power to bind as apprentices pauper children under their jurisdiction. See stats. 43 Eliz. c. 2; 20 Geo. 2, c. 19; 18 Geo. 3, c. 47; 42 Geo. 3, c. 46; 56 Geo. 3, c. 139; 3 & 4 Will. 4, c. 63; 7 & 8 Vict. c. 101. As to apprenticeship of children in industrial schools, see stat. 29 & 30 Vict. c. 118, s. 28. By 3 & 4 Vict. c. 85, no child under sixteen years of age may be apprenticed to a chimney-sweep.

Premium, whether a necessary.

(*b*) Where a brother advanced 40*l.* to pay a premium for apprenticing his infant sister to a milliner, it was held that this could not be considered a payment for necessaries so as to be recoverable: *Smith* v. *Gibson*, Peake, Add. Ca. 52.

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ever, no common law right to bind his child as apprentice, so that the execution of the deed by the infant himself is necessary to bind him: *R.* v. *Ormesby*, 3 B. & Ad. 584. An infant may be bound to his father, *R.* v. *Chillesford*, 4 B. & C. 94, or mother, *Gilbert* v. *Schwenck*, 14 M. & W. 488, or to another infant, in which case the contract will be voidable by the master when he comes of age: *R.* v. *St. Petrox*, 4 T. R. 196. The apprentice may be bound to his master, and to his executors and administrators, who, provided they continue to carry on the business and instruct the apprentice therein, may enforce the contract: *Cooper* v. *Simmons*, *ubi supra*.

Consideration.

Every contract of apprenticeship must set forth on the face of it the premium or consideration, and must be duly stamped accordingly: *R.* v. *Keynsham*, 5 East, 311.

Rights and duties of parties.

An infant cannot generally be sued on his covenant; *Gilbert* v. *Fletcher*, Cro. Car. 179; but there is an exception to this rule under the custom of London, where a master can sue his apprentice, if over fourteen years of age, on his covenant: *Horn* v. *Chandler*, 1 Mod. 271; *Burton* v. *Palmer*, 2 Bulstr. 192. The father or guardian is usually made to covenant that the infant shall duly perform and observe his service and obligations under the articles, and the guarantor will be liable in case of the infant's default, *Branch* v. *Ewington*, 2 Doug. 518, even though the apprentice avoid the contract on attaining twenty-one years of age: *Cuming* v. *Hill*, 3 B. & Ad. 59. The guarantor will not however be held liable under his covenant for trifling misconduct on the part of the apprentice, *Wright* v. *Gibbon*, 3 C. & P. 583, but only for such gross disobedience to orders or lengthened absence from work as shall materially injure the master's interests.

Obligations of master.

A master is bound, during the illness of his apprentice, to provide him with proper medicines; *Reg.* v. *Smith*, 8 C. & P. 153; and any master or mistress who, being liable to provide for any apprentice necessary food, clothing, lodging or medical aid, wilfully refuses or neglects so to do, or who unlawfully and maliciously causes bodily harm, whereby

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life is endangered, or health permanently injured, is punishable by fine or imprisonment. See stats. 24 & 25 Vict. c. 100, s. 26 and 38 & 39 Vict. c. 86, s. 6.

Where a deed of apprenticeship contained no express provision as to the place where the business was to be carried on, it was held that there must be taken to be implied in the contract a stipulation that the service shall be performed at the place where the business was carried on at the time of the execution of the deed: *Eaton* v. *Western* (C. A.), 9 Q. B. D. 636; overruling *Royce* v. *Charlton*, 8 Q. B. D. 1.

And the master must have the apprentice under his own care and inspection, and cannot send him abroad, even under pretence of improvement, unless by express agreement, and unless the nature of his business requires it, and implies such a power, as in the case of, *e. g.*, a sailor: Bac. Abr. "Master," &c. (E.). And see *Coventry* v. *Woodhall*, Hob. 134.

Whatever an apprentice gains during his service belongs to the master, who may bring an action for it: *Barber* v. *Dennis*, 1 Salk. 68 (*c*). See also *Morrison* v. *Thompson*, L. R., 9 Q. B. 215.

Enrolment.

Articles of clerkship must be enrolled within six months after execution. See stat. 6 & 7 Vict. c. 73, sect. 8, and produced to the registrar within three months after enrolment. See stat. 23 & 24 Vict. c. 127, sect. 7. Enrolment of other apprentice deeds is necessary by the custom of London and some other places. See Bac. Abr. "Master and Servant and Apprentice" (A.)

Assignment.

A master may not assign over his apprentice as he may a chattel, but it must be with his own consent: per Holt, C. J., *Anon.*, 12 Mod. 441. But by the custom of London, a freeman may turn over

(*c*) By the stat. 28 & 29 Vict. c. 73, s. 7, "If the wages of a seaman (in the Royal Navy) or marine are claimed under an indenture of apprenticeship by a master, they shall be paid to the seaman or marine, and not to the master, unless the master produces the indenture, with satisfactory proof that it was in full force during the period for which he claims the wages, and that the apprentice was, at the time of the execution of the indenture, under the age of eighteen years, and had not previously been at sea."

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his apprentice to another master being a freeman; and such second master shall have the same benefit of the apprentice's covenants as shall the apprentice of the covenants on the side of the master, as if he had been originally bound to him. Bac. Abr. "Master," &c. (E.)

Whether articles of clerkship are assignable.

By the stat. 6 & 7 Vict. c. 73, sect. 13, articled clerks whose masters have died or left off practice, or if the contract be by mutual consent of the parties cancelled, "shall and may enter into fresh contracts for the residue of the term." And it is now settled that articles of clerkship are not assignable, but that a clerk, under any of the above circumstances, must enter into fresh articles, as otherwise his service will not count as service under the Act: *Ex parte Adams*, 4 Ch. D. 39.

Dissolution of the contract.

Misconduct of apprentice.

The covenants in a deed of apprenticeship are independent, entitling each party to his remedy for a breach of them. Disobedience of orders, or other acts of misconduct on the part of the apprentice, will not generally entitle the master to put an end to the contract; *Winston* v. *Lynn*, 1 B. & C. 46; *Wise* v. *Wilson*, 1 C. & K. 669; *Phillips* v. *Clift*, 28 L. J., Ex. 153; but where a contract provided that the apprentice should obey all commands and give his services entirely to the business during office hours, it was held that the proviso empowered the master to dismiss his apprentice for wilful disobedience and habitual neglect of his duties: *Westwick* v. *Theodore*, L. R., 10 Q. B. 224. And if the misconduct of the apprentice is such as to render it impossible for the master to teach him the business, the master will not be liable for not performing his part of the contract in this respect: *Raymond* v. *Minton*, L. R., 1 Ex. 244. So if the apprentice runs away and enlists (*d*), the master cannot be com-

(*d*) Articled clerks and apprentices are exempt from serving in the militia. See stat. 42 Geo. 3, c. 90, s. 45. And by the stat. 52 Geo. 3, c. 38, s. 65, apprentices are not allowed to enlist in the army, navy, or marines, or to enter the militia without the consent of their masters, but service in the militia under the Act is not to avoid or affect any indenture of apprenticeship. See also the Army Discipline Act, 1879 (42 & 43 Vict. c. 33), sect. 92.

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pelled to take him back again; *Hughes* v. *Humphreys*, 6 B. & C. 680; and in such a case the master is not compellable to return any part of the apprenticeship fee: *Cuff* v. *Brown*, 5 Pri. 297.

Mutual consent.

Indentures of apprenticeship may be cancelled by mutual consent. And an infant may, on coming of age, avoid the contract so far as his own personal liability is concerned, but such avoidance will not free his guarantor from liability for breach of the contract.

Division of business.

Where a master covenants to teach his apprentice several trades, and afterwards relinquishes one of them, he commits a breach of contract, which altogether releases the apprentice: *Ellen* v. *Topp*, 6 Ex. 424; *S. C.*, 20 Ex. 241. So where a partnership was dissolved, and two firms established, each of which carried on one department of the business only, it was held that neither firm was entitled to the service of an apprentice of the original partnership: *Eaton* v. *Western* (C. A.), 9 Q. B. D. 636. And where two partners agreed to teach an apprentice their business, and one of the partners retired from the firm, it was held that the agreement was broken: *Couchman* v. *Sillar*, 22 L. T., N. S. 480; *S. C.*, 18 W. R. 757.

Bankruptcy of master.

The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), re-enacting the provisions of the repealed Act of 1869, sect. 33, enacts that—

Preferential claim in case of apprenticeship.

Sect. 41. "(1.) Where at the time of the presentation of the bankruptcy petition any person is apprenticed or is an articled clerk to the bankrupt, the adjudication of bankruptcy shall, if either the bankrupt or apprentice or clerk gives notice in writing to the trustee to that effect, be a complete discharge of the indenture of apprenticeship or articles of agreement; and if any money has been paid by or on behalf of the apprentice or clerk to the bankrupt as a fee, the trustee may, on the application of the apprentice or clerk, or of some person on his behalf, pay such sum as the trustee, subject to an appeal to the Court, thinks reasonable, out of the bankrupt's property, to or for the use of the apprentice or clerk, regard being had to the amount paid by him or on his behalf, and to the time during which he served with the bankrupt under the indenture or articles before the

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commencement of the bankruptcy, and to the other circumstances of the case.

"(2.) Where it appears expedient to a trustee, he may, on the application of any apprentice or articled clerk to the bankrupt, or any person acting on behalf of such apprentice or articled clerk, instead of acting under the preceding provisions of this section, transfer the indenture of apprenticeship or articles of agreement to some other person."

Under the former Bankruptcy Acts the issue of the commission or fiat, or the filing of a petition for adjudication against the master, *ipso facto* operated as a discharge of the apprenticeship; and accordingly it was held that such discharge was not invalidated by the fiat being annulled in consequence of the acceptance by the creditors of a composition: *Allen* v. *Coster*, 1 Beav. 274. Now, however, neither the presentation of the bankruptcy petition nor the adjudication of bankruptcy will operate as a discharge of the apprenticeship or articles unless the prescribed notice is given by the bankrupt or his apprentice or clerk. It was held that under the stat. 6 Geo. 4, c. 16, s. 49, the father of an apprentice was entitled on the master's bankruptcy to a return of part of the fee which he had paid, although the indenture of apprenticeship had not been executed when the bankruptcy took place: *Ex parte Haynes*, 2 Gl. & J. 122. When the fee has not been paid at the time of the bankruptcy, a reasonable portion may be deducted, having regard to the length of time during which the apprentice has served previous to the bankruptcy, and the remainder of the fee must be made good to the bankrupt's estate: *Ex parte Soames*, 3 D. & C. 320. See also Robson on Bankruptcy, 229.

Deaths, &c. of parties.

The obligation of the master as regards instruction of the apprentice being a thing personal, the death of the master generally puts an end to the apprenticeship. See *Farrow* v. *Wilson*, L. R., 4 C. P. 744; *Robinson* v. *Davison*, L. R., 6 Ex. 269. But it does not seem to be clear whether the executors of the master will not continue liable as far as they have assets as regards *maintenance* of the apprentice. See Bac. Abr. "Masters," &c. (G.) An apprentice

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is not bound to serve the executor of his master, *Baxter* v. *Barfield*, 2 Str. 1266, unless the contract contains a special provision to that effect: *Cooper* v. *Simmons*, 7 H. & N. 707.

The death of the apprentice will of course determine the contract, as also will his disability through permanent illness: *Boast* v. *Firth*, L. R., 4 C. P. 1. In case of determination of the apprenticeship before the expiration of the term of service, it appears to be now settled, after some difference of opinion, that the return of the premium, or a proportionate part thereof, cannot be claimed by or on behalf of the apprentice on the ground of partial failure of consideration. See *Winchcup* v. *Hughes*, L. R., 6 C. P. 78, and the cases there cited. When, therefore, it is intended that in case the apprentice shall be prevented by death or other circumstances from serving his full term, part of the premium shall be returned, an express stipulation to that effect must be inserted in the articles; or the premium may be made payable in instalments, the payment of each instalment being made conditional on the parties being alive and capable of fulfilling their respective obligations under the articles at the time fixed for payment. See Precedent VI., *post*, p. 89.

Settlement of disputes.

By the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 3, the County Courts are empowered in the case of disputes between employers and workmen to adjust claims, rescind contracts, award and accept security for damages; by sect. 4, courts of summary jurisdiction are empowered to hear and determine such disputes in cases where the amount does not exceed 10*l.*, and provided that no order shall be made for payment, nor security be required, of or to an amount exceeding 10*l.* The Act then enacts as follows:—

Jurisdiction of justices in disputes between masters and apprentices.

Sect. 5. "Any dispute between an apprentice to whom this Act applies and his master, arising out of or incidental to their relation as such (*e*) (which dispute is hereinafter referred to as

(*e*) It was held in *Reg.* v. *Proud*, L. R., 1 C. C. R. 71, that under the stat. 4 Geo. 4, c. 34, s. 2, the justices had jurisdiction to adjudicate in a dispute between a master and his apprentice when, although the summons was not taken out, their relation as such had ceased.

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a dispute under this Act), may be heard and determined by a court of summary jurisdiction."

Powers of justices in respect of apprentices.

Sect. 6. "In a proceeding before a court of summary jurisdiction in relation to a dispute under this Act between a master and an apprentice, the Court shall have the same power as if the dispute were between an employer and a workman, and the master were the employer and the apprentice the workman, and the instrument of apprenticeship a contract between an employer and a workman, and shall also have the following powers:—

"(1) It may make an order directing the apprentice to perform his duties under the apprenticeship (*f*); and

"(2) If it rescinds the instrument of apprenticeship it may, if it thinks it just so to do, order the whole or any part of the premium paid on the binding of the apprentice to be repaid.

"Where an order is made directing the apprentice to perform his duties under the apprenticeship, the Court may, from time to time, if satisfied after the expiration of not less than one month from the date of the order that the apprentice has failed to comply therewith, order him to be imprisoned for a period not exceeding fourteen days."

Order against surety of apprentice, and power to friend of apprentice to give security.

Sect. 7. "In a proceeding before a court of summary jurisdiction in relation to a dispute under this Act between a master and an apprentice, if there is any person liable, under the instrument of apprenticeship, for the good conduct of the apprentice, that person may, if the Court so direct, be summoned in like manner, as if he were the defendant in such proceeding, to attend on the hearing of the proceeding, and the Court may, in addition to or in substitution for any order which the Court is authorized to make against the apprentice, order the person so summoned to pay damages for any breach of the contract of apprenticeship to an amount not exceeding the limit (if any) to which he is liable under the instrument of apprenticeship.

"The Court may, if the person so summoned, or any other person, is willing to give security to the satisfaction of the Court for the performance by the apprentice of his contract of apprenticeship, accept such security instead of or in mitigation of any punishment which it is authorized to inflict upon the apprentice."

The following sections of the Stamp Act, 1870

(*f*) Where an infant was apprenticed by a deed containing a provision that the master should not be liable to pay wages to the apprentice so long as his business should be interrupted or impeded by or in consequence of any turn-out: it was held that, the provision not being for the benefit of the infant, an order could not be made under this section directing him to perform his duties: *Meakin* v. *Morris*, 12 Q. B. D. 352.

(33 & 34 Vict. c. 97), relate to instruments of apprenticeship:—

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Sect. 39. "Every writing relating to the service or tuition of any apprentice, clerk, or servant placed with any master to learn any profession, trade, or employment, (except articles of clerkship to attorneys and others hereby specifically charged with duty,) is to be deemed an instrument of apprenticeship."

Sect. 40. "The full sum of money, and the value of any other matter or thing paid, given or assigned, or secured to be paid, given or assigned, to or for the benefit of the master with or in respect of any apprentice, clerk or servant, (not being a person bound to serve in order to admission in any Court,) is to be fully and truly set forth in an instrument of apprenticeship; and if any such sum, or other matter or thing, be paid, given, assigned, or secured as aforesaid, and no such instrument be made, or if any such instrument be made, and such sum, or the value of such other matter or thing, be not set forth therein as aforesaid, the master, and also the apprentice himself, if of full age, and any other person being a party to the contract, or by whom any such sum, or other matter or thing, is paid, given, assigned, or secured, shall forfeit the sum of twenty pounds, and the contract, and the instrument (if any) containing the same, shall be null and void."

The following table of duties is given in the schedule to the Act:—

Apprenticeship, instrument of.	£	*s.*	*d.*
Where there is no premium or consideration	0	2	6
In any other case—			
For every 5*l.*, and also for any fractional part of 5*l.*, of the amount or value of the premium or consideration	0	5	0

Exemptions.

(1) Instrument relating to any poor child apprenticed by or at the sole charge of any parish or township, or by or at the sole charge of any public charity, or pursuant to any Act for the regulation of parish apprentices.

(2) Instrument of apprenticeship in Ireland, where the value of the premium or consideration does not exceed 10*l.*

And see sections 39 and 40.

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	£	s.	d.
ARTICLES OF CLERKSHIP whereby any person first becomes bound to serve as a clerk in order to his admission.			
(1) As an attorney or solicitor in any of Her Majesty's Courts at Westminster or in Ireland, or as a proctor in the High Court of Admiralty, or any Ecclesiastical Court in England or Ireland	80	0	0
(2) As an attorney or solicitor in any of the Courts of the counties palatine of Lancaster and Durham, or as a writer to the signet, or as a solicitor, agent, or attorney in the Court of Session, justiciary, or commission of teinds in Scotland	60	0	0
(3) As a procurator or solicitor in any inferior court in Scotland	0	2	6
And see sections 41, 42, 43 and 44.			
ARTICLES OF CLERKSHIP whereby any person having been before bound by duly stamped articles to serve as a clerk in order to his admission in any of the Courts aforesaid, and not having completed his service so as to be entitled to such admission, becomes bound afresh for the same purpose	0	10	0

Apprenticeship to several masters.

An indenture by which an apprentice is bound to two different masters for consecutive periods to learn two different trades requires only one stamp: *R.* v. *Louth*, 8 B. & C. 247. An assignment of apprenticeship will not require an additional stamp by reason of its containing fresh stipulations for extending the period of service, &c.: *Morris* v. *Cox*, 2 Man. & Gr. 659.

Sea service.

All indentures of apprenticeship to sea service are exempted from stamp duty. See stat. 16 & 17 Vict. c. 104, s. 143; and this exemption is kept up by sect. 3 of the Stamp Act, 1870.

Ad valorem duty.

An indenture of apprenticeship must be stamped with the *ad valorem* duty on the premium within the time prescribed by the stat. 8 Anne, c. 9, sects. 36, 37, 38: *R.* v. *Church Hulme*, 5 B. & Ad. 1029 (*b*). No *ad valorem* duty is payable in respect of the benefit to the master when the apprentice covenants to provide himself with meat, drink, lodging, &c.,

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R. v. *Walton*, 3 T. R. 515, or where his friends undertake to maintain and clothe him, &c.: *R.* v. *Leighton*, 4 T. R. 732. See also *R.* v. *Bradford*, 3 B. & Ad. 569. Where a master stipulates for a part of the earnings of the apprentice, that is no benefit on which additional duty is payable, inasmuch as by law the master is entitled to the whole: *R.* v. *Wantage*, 1 East, 601. So, also, where an apprentice covenanted to provide for himself during the term, and allow his master two shillings per week out of his wages: *R.* v. *Bradford*, 1 M. & S. 151.

Parish apprentice.

The consideration for the assignment of a parish apprentice need not be set out: *R.* v. *Ide*, 2 B. & Ad. 866.

PRECEDENTS.

I. *ARTICLES of* APPRENTICESHIP *to a* TRADER. (Short Form.)

THIS INDENTURE, made the ——— day of ———,

Parties. 18—, BETWEEN [*apprentice*], of the first part; [*father of apprentice*], of &c., of the second part; and [*master*], of &c., of

Apprentice binds himself. the third part; WITNESSETH that the said [*apprentice*] of his own free will, and with the consent of the said [*father*], hereby binds himself as apprentice to the said [*master*] during the term of ——— years, to learn the trade and business

Covenants by father. aforesaid; AND the said [*father*] hereby covenants with the said [*master*] that, during the said term, the said [*apprentice*] shall honestly, faithfully and diligently serve and obey the said [*master*], and shall not do or commit, or suffer to be done or committed, any waste, damage or injury of or to the property of the said [*master*], and shall not unlawfully absent himself from the service of the said [*master*]; and further, that he, the said [*father*], will, at his own expense, provide the said apprentice with good and sufficient clothes, washing, medicines and medical attendance, and other necessaries, except as is hereinafter otherwise stipulated, during the said term:

Covenants by master to instruct. IN CONSIDERATION whereof, and also in consideration of the premium or sum of £——— now paid to the said [*master*] by the said [*father*] (the receipt whereof is hereby acknowledged), the said [*master*] hereby covenants with the said [*father*], and also with the said [*apprentice*], that he, the said [*master*], will during the said term take and receive as his apprentice, and to the best of his knowledge and ability teach and instruct in the trade and business of a ———, and all things incident thereto, the said [*apprentice*], in such manner as he, the said [*master*], now does or shall hereafter

To provide board, &c. use or practise the same; and will also during the said term provide the said [*apprentice*] with good and sufficient board and lodging; and will also, from and after the expiration of

I. To Trader.

the first year of the said term, pay to the said [*apprentice*] wages at the rates and in manner following, that is to say, during the second year of the said term the sum of ——— per week [*or* month], and during the third year of the said term the sum of ——— per week [*or* month], and during the remainder of the said term the sum of ——— per week [*or* month]; and will, on the completion of the said term, endorse on these presents a certificate that the said [*apprentice*] has duly served his apprenticeship in due conformity to these presents, and deliver the same so endorsed to the said apprentice. In witness, &c.

To pay wages.

To endorse certificate of service.

II. *ARTICLES of* Apprenticeship *to* Sea Service (*a*).

THIS INDENTURE, made the ——— day of ———, 18—, Between [*apprentice*], of ———, in the county of

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Sea service.

(*a*) The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), contains the following provisions with regard to apprentices to the sea service:—

Shipping masters to assist in binding apprentices, and may receive fees.

Sect. 141. "All shipping masters appointed under this Act shall, if applied to for the purpose, give to any board of guardians, overseers, or other persons desirous of apprenticing boys to the sea service, and to masters and owners of ships requiring apprentices, such assistance as is in their power for facilitating the making of such apprenticeships, and may receive from persons availing themselves of such assistance such fees as may be determined in that behalf by the Board of Trade, with the concurrence, so far as relates to pauper apprentices in England, of the Poor Law Board in England, and so far as relates to pauper apprentices in Ireland, of the Poor Law Commissioners in Ireland."

Indentures of boys bound apprentices to sea service by guardians or overseers to be witnessed by two justices.

Sect. 142. "In the case of every boy bound apprentice to the sea service by any guardians or overseers of the poor, or other persons having the authority of the guardians of the poor, the indentures shall be executed by the boy and the person to whom he is bound in the presence of and shall be attested by two justices of the peace, who shall ascertain that the boy has consented to be bound, and has attained the age of twelve years, and is of sufficient health and strength, and that the master to whom the boy is to be bound is a proper person for the purpose."

Indentures of apprenticeship to be exempt from stamp duty,

Sect. 143. "All indentures of apprenticeship to the sea service shall be exempt from stamp duty; and all such indentures shall be in duplicate; and any person to whom any boy whatever is bound as an apprentice to the sea service in the United King-

II. To Sea Service.

———, of the one part, and [*master*], of ———, in the county of ———, of the other part; WHEREAS the said apprentice attained the age of ——— years on the ——— day of ——— now last past: NOW THIS INDENTURE WITNESSETH that the said [*apprentice*] of his own free will places and binds himself to the said [*master*] during the term of ——— years from the date of these presents, and hereby covenants with the said [*master*] that during the said term he will honestly, faithfully and diligently serve the said [*master*] and such other person or persons in the navigation of any ship or vessel as the said [*master*] shall direct and appoint, and will obey his and their lawful commands on board any ship or vessel in or to which he shall be ordered by

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and to be recorded.

dom shall within seven days after the execution of the indentures take or transmit the same to the Registrar-General of Seamen or to some shipping master; and the said registrar or shipping master shall retain and record one copy, and shall indorse on the other that the same has been recorded, and shall re-deliver the same to the master of the apprentice; and whenever any such indenture is assigned or cancelled, and whenever any such apprentice dies or deserts, the master of the apprentice shall, within seven days after such assignment, cancellation, death, or desertion, if the same happens within the United Kingdom, or if the same happens elsewhere, so soon afterwards as circumstances permit, notify the same either to the said Registrar of Seamen, or to some shipping master, to be recorded; and every person who fails to comply with the provisions of this section shall incur a penalty not exceeding ten pounds."

Rules to govern apprenticeship of paupers in Great Britain and Ireland respectively.

Sect. 144. "Subject to the provisions hereinbefore contained, all apprenticeships to the sea service made by any guardians or overseers of the poor, or persons having the authority of guardians of the poor, shall, if made in Great Britain, be made in the same manner and be subject to the same laws and regulations as other apprenticeships made by the same persons," and if made in Ireland to be subject to certain rules as therein provided.

Apprentices and their indentures to be brought before shipping masters before each voyage in a foreign-going ship.

Sect. 145. "The master of every foreign-going ship shall, before carrying any apprentice to sea from any place in the United Kingdom, cause such apprentice to appear before the shipping master before whom the crew is engaged, and shall produce to him the indenture by which such apprentice is bound, and the assignment or assignments thereof (if any); and the name of such apprentice, with the date of the indenture and of the assignment or assignments thereof (if any), and the name of the port or ports at which the same have been registered, shall be entered on the agreement; and for any default in obeying the provisions of this section the master shall for each offence incur a penalty not exceeding five pounds."

him or them to go, and will, when required, render to the said [*master*] and such person or persons as aforesaid, true accounts of all goods, merchandise and moneys belonging to the said [*master*], which shall be committed to the charge of or come into the hands of the said [*apprentice*]: And that he, the said [*apprentice*], will not do or willingly suffer to be done by others any hurt, prejudice or damage to the goods, merchandise or other property or affairs of the said [*master*], or of any such person or persons as aforesaid, but will, to the utmost of his power, hinder and prevent the same, and immediately give to him or them notice thereof; And will not, without leave, absent himself from his service, nor frequent taverns, nor play at unlawful games, but will in all respects behave and demean himself as a good and faithful apprentice towards the said [*master*] and such other person or persons as aforesaid: In consideration whereof the said [*master*] covenants with the said [*apprentice*], that during the said term he, the said [*master*], will teach, or cause to be taught, the said [*apprentice*] in the art, business and duties of a seaman, and will find and provide the said [*apprentice*] with sufficient food, drink, washing, medicine and medical and surgical aid and attendance, and also all sea bedding and wearing apparel, both woollen and linen, and other necessaries, and will after expiration of the first year [*or* "of the first ——— years"] of the said term pay to the said [*apprentice*] wages at the rates and in manner following, &c. [*Ante*, p. 79.]

II. To Sea Service.

Covenants by master.

In witness, &c.

III. *ARTICLES of* Apprenticeship *to a* Merchant, *with* Special Provisions.

THIS INDENTURE, made the ——— day of ———, 18—, Between [*apprentice*], of &c., of the first part; [*father*], of &c., the father of the said [*apprentice*], of the second part; and [*master*], of &c., carrying on the trade or business of ——— at ——— of the third part: WITNESSETH, and it is hereby agreed and declared, and the said [*father*], so far as relates to the acts and stipulations on the part of himself and of the said [*apprentice*] to be performed and observed, covenants with the said [*master*], and the said

Parties.

Testatum.

III. To Merchant, with Special Provisions.

[*master*], so far as relates to the acts and stipulations on his part to be performed and observed, covenants with the said [*father*], and also separately with the said [*apprentice*], as follows, that is to say:—

Apprentice binds himself.

1. The said [*apprentice*], of his own free will and accord, and with the consent of the said [*father*], hereby places and binds himself as apprentice with and to the said [*master*], from the date of these presents for the term of ——— years, to learn the trade or business of ———.

Covenants by father that apprentice will serve,

2. The said [*apprentice*] will, during the said term, well and truly serve the said [*master*], as apprentice in the trade or business aforesaid, at such place or places, either within the United Kingdom or elsewhere, as the said [*master*] shall direct and appoint, and will diligently attend to the business and concerns of the said [*master*].

and not absent himself;

3. The said [*apprentice*] will not, without permission, absent himself from the service of the said [*master*], nor do or commit any damage or waste to the said [*master*] or his concerns, nor knowingly suffer the same to be done by others, if within his power to prevent it, nor without forthwith giving notice thereof to the said [*master*].

to assist in conducting master's business;

4. The said [*apprentice*] will, during the said term, receive and take into his care and custody all such goods and merchandise and other articles of every description as shall be consigned or sent to him by or for the use or on account of the said [*master*], and will sell and dispose of the same to the best possible profit, for the benefit of the said [*master*]. And also will, at all times during the said term, follow and perform the advice, direction and orders of the said [*master*], which shall by letters or otherwise be sent, given or made known to him, the said [*apprentice*], concerning such goods, merchandise and articles as aforesaid.

to keep books of accounts;

5. The said [*apprentice*] will, at the cost of the said [*master*], provide and keep in good order books of account concerning such his employment as aforesaid, according to the custom of merchants in such cases: And will deal justly, truly and faithfully with the said [*master*], in all and every his accounts, reckonings, bargains and dealings relating to and concerning his said employment, and will, from time to time, as occasion shall arise, send to the said [*master*] true accounts of all the business and dealings of him the said [*apprentice*], and letters

of advice of all such measures and occurrences wherewith it shall be proper that the said [*master*] shall be acquainted, and will return to ——— aforesaid, if employed away therefrom, whenever thereunto required by the said [*master*], by letter or otherwise, with all his accounts and reckonings duly made up and in proper order.

to deliver accounts.

6. The said [*apprentice*] will, from time to time, when requested so to do, produce and show to the said [*master*] all his books of account concerning all such dealings as aforesaid, and make and give to the said [*master*] a just and perfect account and reckoning of and concerning all and every such goods, merchandise and other articles and moneys which shall come into his hands of or on behalf of the said [*master*]. And, moreover, that he will, within ——— days after every such account as aforesaid shall have been sent to the said [*master*], deliver and pay to the said [*master*] all and every such goods, merchandise and other articles and moneys as by such account shall be shown to be due from the said [*apprentice*] to the said [*master*].

Covenant by father to provide necessaries.

7. The said [*father*] will at his own cost provide the said [*apprentice*] during the said term with sufficient and suitable clothes and apparel, and also with medicine and medical attendance and other necessaries, except as is hereinafter mentioned.

Covenants by master to take apprentice;

8. In consideration of the service of the said [*apprentice*] and of the covenants and stipulations on his part and on the part of the said [*father*] to be observed and performed, and also in consideration of the premium or sum of £———, paid &c., the said [*master*] agrees to take and accept the said [*apprentice*] as his apprentice during the said term, and to employ him not only at ——— aforesaid but also at other places in the United Kingdom and abroad where the said [*master*] now has or shall hereafter during the said term have dealings.

to employ and instruct apprentice;

9. The said [*master*] will employ and instruct the said [*apprentice*], or cause him to be employed or instructed, in the said trade or business of ———, and in all matters incident thereto, to the best of his skill, knowledge and ability.

to provide board and lodging,

10. The said [*master*] will either provide the said [*apprentice*] with good and sufficient board and lodging in the house

III. To Merchant, with Special Provisions.

of him, the said [*master*], in a similar manner with his own family, and so that the said [*apprentice*] shall at all times take his meals at the table with, and at the same time as, the master and his family; or will, if and whenever the said [*apprentice*] shall be absent from ——— aforesaid on the business of the said [*master*], and at any other times if the said [*master*] shall so think proper, pay or allow to the said [*apprentice*] during the said term or any part thereof the sum of £——— per month in lieu and full satisfaction of the board and lodging of the said [*apprentice*].

or allowance in lieu thereof;

to pay expenses of journeys, &c.;

11. The said [*master*] will also at all times during the said term pay all the expenses of and incident to any journeys which the said [*apprentice*] shall make to any place or places in the United Kingdom or elsewhere, on the business and by the direction or with the sanction of the said [*master*].

to pay wages.

12. From and after the expiration of the second year of the said term the said [*master*] shall pay to the said [*apprentice*] wages at the rates and in manner following, that is to say, during the third year of the said term, &c. [*as agreed*].

Apprentice may terminate contract by notice.

13. The said [*apprentice*] shall, if he shall think proper, and shall of his intention give ——— weeks' notice in writing of such his intention, be at liberty freely to leave the service of the said [*master*] at the expiration of the —th year of the said term, and to use and employ the remaining year of his apprenticeship to his own benefit and advantage, where and as he shall think fit, without let or hindrance from or by the said [*master*], but so nevertheless that during the said remaining year the said [*apprentice*] shall not in that case be entitled to any board or lodging, or allowance or payment in lieu or satisfaction thereof respectively, or to any wages from or at the cost of the said [*master*], and that the said [*master*] shall not be entitled to any gains or earnings made by the said [*apprentice*] during that year.

In witness, &c.

IV. *ARTICLES of* APPRENTICESHIP *to an* ARCHITECT *and* SURVEYOR.

THIS INDENTURE, made the ——— day of ———, 18—, BETWEEN [*apprentice*], of &c., of the first part, [*guardian*], of &c., of the second part, and [*master*], of &c., of the third part: WHEREAS A. B., late of &c., the father of the said [*apprentice*], died on the ——— day of ———, 18—, having by his will, dated the ——— day of ———, and which has since been duly proved, appointed the said [*guardian*] to be the guardian of his children during their respective minorities: AND WHEREAS the said [*apprentice*] attained the age of ——— years on the ——— day of ——— last: AND WHEREAS the said [*master*] has agreed to take the said [*apprentice*] as his apprentice or pupil on the terms and conditions hereinafter mentioned, for the purpose of his being taught the arts, businesses or employments of an architect and surveyor: NOW THIS INDENTURE WITNESSETH, and it is hereby agreed and declared, and the said [*guardian*], so far as relates, &c. [*mutual covenants as in the last precedent*, ante, p. 81], as follows, that is to say:—

Parties.

Recitals: of will of apprentice's father;

of age of apprentice;

of agreement by master to take apprentice.

Testatum.

1. The said [*apprentice*], of his own free will and accord, and with the consent of the said [*guardian*], hereby places and binds himself as apprentice or pupil with and to the said [*master*] during the term of ——— years, to be computed from the ——— day of ——— next, to learn the arts, businesses or employments of an architect and surveyor.

Apprentice binds himself.

2. The said [*apprentice*] will, during the said term, well and truly serve the said [*master*] in the said arts or businesses of an architect and surveyor, and will diligently attend to his business and affairs at the offices of the said [*master*], or elsewhere, in the United Kingdom, as he the said [*master*] shall direct, from the hour of ——— o'clock in the morning until the hour of ——— in the evening, save and except an interval of one hour and a half, which is to be allowed to the said [*apprentice*] for the purpose of dinner and relaxation.

Covenant by guardian that apprentice will serve;

3. The said [*apprentice*] will not do or commit any damage, default or waste to his said master, or his business, or affairs, nor knowingly suffer the same to be done, if within his power to prevent it, nor without immediately giving

and not waste master's property, &c.

IV. To Architect and Surveyor.

notice thereof to the said [*master*], but will in all respects behave and demean himself as a true and faithful apprentice.

Covenants by master: to instruct;

4. In consideration of the premises, and also in consideration of the premium, &c., the said [*master*] will, from and after the said ——— day of ——— next, during the said term take and receive the said [*apprentice*] as his apprentice or pupil, and will, according to the best of his skill, knowledge and ability, teach and instruct, or cause to be taught or instructed, the said [*apprentice*] in the several arts, businesses or employments of an architect and of a surveyor, and in all matters and things incident thereto; And will permit the said [*apprentice*] to have free and full access to and information concerning all estimates, calculations, drawings, plans, specifications and other matters and things which shall be made, or caused to be made, by him the said [*master*], or which shall come into his possession or under his control or superintendence, with reference to works or business in which he shall be engaged, employed or consulted (unless he shall see any good and special reason to the contrary in any particular instance or instances); And generally will give and afford to the said [*apprentice*] all reasonable facilities and opportunities for learning the principles and practice of the said arts, businesses or employments, in such manner as he the said [*master*] now does, or shall at any time hereafter during the said term use or practise the same; And will, every day during the said term, between the hours of ——— in the morning and ——— in the evening, provide the said [*apprentice*] with proper and convenient accommodation at the office of him the said [*master*], and also will supply the said [*apprentice*], free of charge, with good and sufficient paper, materials, instruments and appliances for the purpose of enabling him to learn and practise the arts, businesses or employments aforesaid.

to pay travelling expenses;

5. In case the said [*master*] shall at any time during the said term employ the said [*apprentice*] away from the office aforesaid in or about any matter or thing connected with any works or business for the time being carried on by or under the superintendence of the said [*master*], he the said [*master*] will bear and pay all expenses of and incident to any journeys undertaken, and all other expenses properly incurred by the

IV. To Architect and Surveyor.

said [*apprentice*], with the sanction of the said [*master*], by reason of such employment.

that in case of apprentice's death part of premium shall be returned;

6. If the said [*apprentice*] shall die, or be disabled by illness or accident from following the art, business, or employment of an architect and surveyor (such disability to be certified by two competent medical practitioners), at any time within ——— calendar months from the date of these presents, he the said [*master*] will return to the said [*apprentice*], or his executors, administrators or assigns, the sum of £———, part of the said premium or sum of £——— so paid by or on behalf of the said [*apprentice*] as aforesaid.

that in case of master's death apprentice shall be assigned to a new master.

7. In case the said [*master*] shall die before the expiration of the said term, then and in such case the executors or administrators of the said [*master*] shall, within ——— weeks after his death, at their own cost, assign the said [*apprentice*] to some competent person, being an architect and surveyor, for the residue then unexpired of the said term, upon terms the same or equally advantageous to the said [*apprentice*] as are contained in these presents; in default whereof, the executors or administrators of the said [*master*] shall pay to the said [*apprentice*] the sum of £——— for every year of the said term which shall be unexpired at the time of the death of the said [*master*].

In witness, &c.

V. *ARTICLES of* Apprenticeship *to a* Firm *of* Engineers.

THIS INDENTURE, made the ——— day of ———, 18—, Between [*apprentice*], of &c., of the first part, [*father*], of &c., the father of the said [*apprentice*], of the second part, and [*engineers*], of &c., mechanical engineers, co-partners, of the third part, WITNESSETH as follows, that is to say:—

Apprentice binds himself.

1. The said [*apprentice*] (hereinafter referred to as the apprentice), with the approbation of his said father, places and binds himself as apprentice to the said [*engineers*], and to the successors and successor of them, and to such other person or persons as may from time to time carry on the business now carried on by them or any of them (all of whom are hereinafter referred to as the firm), to learn the art,

V. To Firm of Engineers.

trade or business of an engineer, and with the firm, after the manner of an apprentice, to serve from the ——— day of ——— next, for the term of ——— years, at ——— aforesaid, or at any other place in England or Wales at which the firm may for the time being carry on their said business.

Covenant by father for service of apprentice.

2. The said [*father*] hereby covenants that the apprentice will during the said term well and truly serve, &c. [*ante*, p. 85].

Covenant by father to provide board, lodging and necessaries.

3. The said [*father*] hereby further covenants with the firm that he will at all times during the said term provide the apprentice with sufficient and suitable board, lodging, washing and clothes, medicine and medical attendance, pocket money and all other necessaries, at ——— aforesaid: PROVIDED ALWAYS, that if the firm shall at any time during the said term employ the apprentice at any place in England or Wales, more than ——— miles distant from ———, then and in such and so long as the apprentice shall be so employed, the firm shall find and provide the apprentice with sufficient and suitable board and lodging, and the said [*father*] shall pay to the firm the sum of ——— per week in respect thereof.

Proviso in case of employment away from home.

Masters accept apprentice.

4. In consideration of the service of the apprentice and the covenants on the part of the apprentice and the said [*father*] hereinbefore contained, and also in consideration of the sum of £——— paid by the said [*father*] to the firm, the receipt whereof is hereby acknowledged, the firm hereby agree to take the apprentice into their said business of mechanical engineers for and during the term aforesaid.

Covenants by masters to teach, &c.

5. The said [*engineers*] covenant with the apprentice, and also separately with the said [*father*], that the firm will during the said term teach and instruct the apprentice, or cause him to be taught and instructed in all branches of the said business, and in all things incident thereto, and give him access to estimates, calculations, specifications, drawings and plans of engines, machines, works or things undertaken or proposed to be undertaken by the firm, and also to their workshops and business premises, and to give him every facility for acquiring a full, practical and theoretical knowledge of the business of a mechanical engineer.

Hours of business.

6. The apprentice shall not be required to attend to the business or concerns of the firm any more than ——— hours in any one and the same day, namely, from the hour of ——— in the morning until the hour of ——— in the

V. To Firm of Engineers.

evening, except two hours to be allowed for dinner and relaxation, unless it shall be unavoidably necessary by reason of extraordinary pressure of business that he should be longer employed.

In case of dissolution of the firm a new master to be provided.

7. It is hereby agreed and declared that if at any time during the said term the firm shall be dissolved, or if they shall cease to carry on, either at ——— or some other place in England or Wales, the business aforesaid in all its branches as now carried on by them, then and in any such case the firm, or some or one of the then members thereof, will within the space of one calendar month thereafter find and provide some other firm or competent person carrying on the business aforesaid in all its branches as now carried on by the firm, and will turn over and assign the apprentice to such firm or person upon and subject to the same or the like conditions and stipulations in all respects as are hereinbefore provided in relation to the present apprenticeship; Or in default thereof, the firm, or some or one of the then members thereof, will immediately on the expiration of the said one calendar month refund to the apprentice, or to the said [*father*], the said premium or sum of £———, or such part thereof as shall bear a just proportion to the time which shall then be unexpired of the said term of apprenticeship.

In witness, &c.

VI. *ARTICLES of* Apprenticeship *to a* Surgeon, *the* Premium *to be paid by* Instalments.

THIS INDENTURE, made the ——— day of ———, 18—, Between [*apprentice*], of &c., of the one part, and [*master*], practising as a surgeon, apothecary and accoucheur at ———, WITNESSETH, and each of them, the said [*apprentice*] and the said [*master*], so far as relates to the acts and stipulations herein contained, and on his part to be performed and observed, covenants with the other of them as follows (*a*), that is to say:—

Apprentice binds himself.

1. The said [*apprentice*] places and binds himself as an

(*a*) The apprentice in this case is of age; if he is an infant, his father or guardian will covenant on his behalf, see *ante*, p. 81.

VI. To Surgeon.

apprentice to the said [*master*] for the term of ——— years from the date of these presents, to learn the arts or professions of a surgeon, apothecary and accoucheur.

Covenant by apprentice to serve.

2. The said [*apprentice*] will serve the said [*master*] well and truly during the said term in the arts or professions aforesaid, and not do or commit any damage, default or waste to his said master or his business or affairs, nor knowingly suffer the same to be done or committed if within his power to prevent it, nor without immediately giving notice to the said [*master*], but will behave and demean himself as a true and faithful apprentice in all respects.

Master accepts apprentice.

3. In consideration of the premises and of the premium or sum of £——— paid by the said [*apprentice*] to the said [*master*] upon the execution of these presents (the receipt whereof is hereby acknowledged), and of the further sums of £——— and £——— respectively to be paid by the said [*apprentice*] to the said [*master*] at the times and in the events and manner hereinafter mentioned, the said [*master*] will take and accept the said [*apprentice*] as such apprentice as aforesaid for and during the said term, and will teach and instruct him in the arts or professions aforesaid, and in all matters and things incident or relating thereto, as are now or shall be hereafter practised by him the said [*master*], and to the best of his skill, knowledge and ability.

Master will provide board, &c.

4. The said [*master*] will find and provide the said [*apprentice*] with good and sufficient board at the table of him the said [*master*], and with suitable lodging; and also with medicine and medical attendance, except as regards fees for advice or attendance of any physician or surgeon other than the said [*master*], which it is hereby agreed shall be paid by the said [*apprentice*] himself.

Liberty to apprentice to walk hospitals.

5. The said [*apprentice*] shall, during the last ——— years of the said term, for ——— days in every week at the least, be at liberty without let or hindrance of or by the said [*master*] to walk or resort to the ——— Hospital, or some other hospital or hospitals to be selected by the said [*apprentice*] with the approval of the said [*master*], and to attend lectures on medicine, surgery and chemistry, and other subjects relating to or connected with the arts or professions hereinbefore mentioned, or any of them.

Further premium to be

6. The said [*apprentice*] shall pay to the said [*master*] the

VI. To Surgeon.

further premium or sum of £———, by the instalments, at the times and in the events and manner following, that is to say, on the ——— day of ———, 18—, the first instalment thereof, being the sum of £———, and on the ——— day of ———, 18—, the residue of the said premium, being the sum of £———: PROVIDED ALWAYS, that at the time appointed for payment of the instalment then payable the said [*apprentice*] and the said [*master*] shall then both be living, and that the said [*master*] shall then be in actual practice as a surgeon, apothecary and accoucheur, and shall have duly observed and performed the covenants herein contained and on his part to be observed and performed, and shall not then have become bankrupt nor made nor entered into any composition, or liquidation, or assignment for the benefit of creditors, or scheme for the arrangement of his affairs within the provisions of the present or any future Bankruptcy Act for the time being in force. IN WITNESS, &c.

paid by instalments.

VII. *ARTICLES of* CLERKSHIP *to a* SOLICITOR.

THIS INDENTURE, made the ——— day of ———, 18—, BETWEEN [*clerk*], of &c., of the first part, [*father of clerk*], of &c., of the second part, and [*solicitor*], of &c., a solicitor of the Supreme Court, of the third part, WITNESSETH that the said [*clerk*], of his own free will, and with the consent of the said [*father*], hereby places and binds himself clerk to the said [*solicitor*], to serve him from the day of the date hereof, for the full term of five years: AND the said [*father*] hereby covenants with the said [*solicitor*] that the said [*clerk*] will honestly, faithfully and diligently serve the said [*solicitor*], as his clerk, in the profession of a solicitor, during the said term; and that the said [*clerk*] will not, at any time during such term, cancel, obliterate, spoil, destroy, waste, embezzle, spend or make away with any of the books, papers, writings, moneys, stamps, chattels or other property of the said [*solicitor*], his executors, administrators or assigns, or of any firm of which the said [*solicitor*] is or may be a member, or any of his or their clients or employers, which shall be deposited in his or their hands, or entrusted to his or their custody or possession,

Clerk binds himself.

Covenants by father.

VII. Articles of Clerkship to Solicitor.

which shall come into the care or possession of the said [*clerk*], and that in case the said [*clerk*] shall act contrary to the covenant lastly hereinbefore contained, or if he the said [*solicitor*], his executors, administrators or assigns, or any such firm as aforesaid, or any partner thereof, shall sustain or suffer any loss, damage or prejudice by the misbehaviour, neglect or improper conduct of the said [*clerk*], the said [*father*], his executors or administrators, will indemnify the said [*solicitor*], his executors and administrators, and any such firm or partner as aforesaid, and make good and refund to him or to them the amount or value thereof; and further, that the said [*clerk*] will, from time to time, and at all times during the said term, keep the secrets of the said [*solicitor*], and any such firm as aforesaid, and of every partner therein, and readily and cheerfully obey and execute his or their lawful and reasonable commands, and will not depart or absent himself from the service or employ of the said [*solicitor*], at any time during the said term, without his consent first obtained, but will from time to time, and at all times during the said term, conduct himself with all due diligence, honesty and propriety: AND the said [*solicitor*], in consideration of the premises, and also of the sum of £——— by the said [*father*] to the said [*solicitor*] paid at or before the execution of these presents (the receipt whereof the said [*solicitor*] hereby acknowledges), covenants with the said [*father*] that the said [*solicitor*] will accept and take the said [*clerk*] as his clerk, and also that the said [*solicitor*] will, by the best ways and means he may or can, and to the utmost of his skill and knowledge, teach and instruct, or cause to be taught and instructed, the said [*clerk*] in the practice or profession of a solicitor which he the said [*solicitor*] now does, or shall at any time hereafter, during the said term, use or practise, and also will, at the expiration of the said term, use his best means and endeavours at the request, costs and charges of the said [*clerk*], to cause and procure him the said [*clerk*] to be admitted a solicitor of the said Supreme Court of Judicature, or any other court of law or equity; Provided that the said [*clerk*] shall have faithfully and diligently served his intended clerkship, and passed the required examinations, and duly qualified himself in all other respects to be admitted to practise as a solicitor. IN WITNESS, &c.

Covenants by solicitor.

VIII. *ASSIGNMENT of* INDENTURE *of* APPRENTICESHIP (*by* ENDORSEMENT) (*a*).

THIS INDENTURE, made the ——— day of ———, 18—, BETWEEN the within-named [*master*], of the first part, the within-named [*apprentice*], of the second part, the within-named [*father of apprentice*], of the third part, and [*new master*], of &c., of the fourth part, WITNESSETH that in consideration of the sum of £——— paid by the said [*old master*] to the said [*new master*], the said [*old master*], with the consent of the said [*apprentice*], and at the request of the said [*father*], hereby assigns unto the said [*new master*], the within-written indenture of apprenticeship, and all the benefit thereof, and all the right, interest, claim and demand of the said [*old master*] thereunder: To HOLD the same for the residue now unexpired of the within-mentioned term of years: AND the said [*father*] hereby covenants with the said [*new master*] that the said [*apprentice*] shall faithfully, diligently and honestly serve the said [*new master*] as his apprentice during the residue of the said term, and that he the said [*father*] will perform and observe all the covenants on his part contained in the within-written indenture in as full and perfect a manner as if they were herein repeated and entered into with the said [*new master*]: AND the said [*new master*] hereby covenants with the said [*father*] and with the said [*old master*] that he the said [*new master*] will, during the remainder of the said term, to the utmost of his skill and knowledge, instruct the said [*apprentice*] in the trade or business of a ———, which he the said [*new master*] now doth or shall hereafter practise, and will perform and observe all the covenants on the part of the said [*old master*] contained in the within-written indenture so far as the same remain to be performed and observed in as full a manner as if they were herein repeated and entered into by the said [*new master*], and will keep the said [*old master*] indemnified from the same, and all actions, claims and demands in respect thereof. IN WITNESS, &c.

Parties.

Testatum.

Assignment of apprenticeship.

Covenants by father with new master.

Covenants by new master.

(*a*) Articles of clerkship to a solicitor are not assignable: *vide ante*, p. 70.

ARBITRATION.

PRELIMINARY DISSERTATION (*a*).

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(*a*) NOTE.—This dissertation and the following precedents apply only to arbitration properly so called, and not to references under the Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 56—59. Nor is it within the scope of this work to enter at any length into matters of procedure connected with setting aside or enforcing performance of awards. For information on these subjects reference may be made to the text books, and particularly to the recent edition of Mr. Russell's Treatise on the Powers and Duties of an Arbitrator.

1. Submissions to Arbitration.

Submissions to Arbitration.

Submissions generally.

As to Submissions generally.]—References to arbitration are peculiarly adapted to the settlement of matters of account and mercantile transactions, which are difficult and almost impossible to be adjusted on a trial at law: 3 Bl. Com. 17. Courts of justice, and many of our law writers, have been full of praises on these domestic tribunals; but, unfortunately, persons who refer disputes to arbitration are not always so well satisfied with the decision of the arbitrators as they would have been with the decision of a Court of justice. For, as arbitrators are frequently suspected of entering on the investigation with minds prejudiced in favour of an opposite party (and there are not wanting instances of gross misconduct in arbitrators), and their decisions are unattended with the formal solemnity of judicial proceedings, the award is too often equally dissatisfactory to all the parties, which leads to further litigation and expense. The office of an arbitrator between neighbours or friends is not a desirable office, and it is generally preferable in the interests of all persons concerned that reference should be made to a stranger.

References may be made in the case of disputes concerning any chattels, or personal wrong: Bac. Abr. Arb. (A.).

Real estate.

It was formerly considered that the right to real estate could not pass by an award, as the superior lord might have been defrauded of his feudal rights; 3 Bl. Com. 17; but it is now well settled that questions as to partition, settlement of boundaries, title, and other matters relating to land, may be submitted to arbitration. See Russ. Arbitr. 4, and the cases there cited.

Criminal matters, &c.

No indictment can be referred to arbitration: see *post*, p. 106. Nor is the question of the validity or dissolution of a marriage capable of such reference; but a husband and wife may agree to refer to arbitration the question whether sufficient cause for a separation exists, and on what terms a separation shall take place, and a suit for judicial separation may be compromised by such reference: *Hart* v. *Hart*, 18 Ch. D. 670.

Submissions to Arbitration.

Future differences.

The Common Law Procedure Act, 1854, sect. 11, renders it competent for parties to agree to submit future differences, if any should arise, to arbitration. See *post*, p. 99.

Many matters relating to the ascertaining of public and private rights are by various statutes directed to be determined by arbitration, and will be noticed in the following pages.

Reference, whether bar to action.

It is now a well-established rule of law that the pendency of a reference, under a general agreement to refer future disputes to arbitration, does not oust the Court of its jurisdiction; *Harris* v. *Reynolds*, 7 Q. B. 71; *Horton* v. *Sayer*, 4 H. & N. 643. And see *Livingstone* v. *Ralli*, 24 L. J., N. S., Q. B. 269; *Scott* v. *Avery*, 5 H. L. C. 811; *Dawson* v. *Fitzgerald* (C. A.), 1 Ex. D. 257; even though it be provided in the agreement that the submission shall be made a rule of Court: *Cooke* v. *Cooke*, L. R., 4 Eq. 77. But an agreement to impose as a condition precedent to a cause of action that the amount of damage, or the time of paying it, shall be settled by arbitration, is a good defence to an action: see *Edwards* v. *Aberayron, &c. Insurance Co.* (Ex. Ch.), 1 Q. B. D. 563.

See further, as to how far, and under what circumstances, an agreement to refer to arbitration may be pleaded in bar to an action, *Williams* v. *London Commercial Exchange Co.*, 10 Ex. 569; *Page* v. *Meek*, 1 N. R. 20; *Wood* v. *Copper Miners' Co.*, 25 L. J., Ch. (N. S.) 166. And as to agreements to refer between railway companies under the Railway Companies Arbitration Act, 1859 (22 & 23 Vict. c. 59), see *Watford Rail. Co.* v. *London & N. W. Rail. Co.*, 38 L. J., Ch. 448. See also Russ. Arbitr. 45.

Effect of general arbitration clauses.

Such agreements are not without use; the Court, though it may not be able to refuse to entertain a suit on account of the existence of an agreement to refer to arbitration, will generally prove to be disposed to encourage a resort to this conventional tribunal for the adjustment of matters which cannot be adequately investigated or dealt with by the Court, and to view with disfavour the conduct of a party who insists upon seeking its aid without having first attempted to obtain redress by this means. Thus, in *Waters* v. *Taylor*, 15 Ves. 10, Lord *Eldon* refused to appoint

Submissions to Arbitration.

a manager and receiver of the Italian Opera House, on the ground that there were special provisions for referring to arbitration these particular subjects of dispute.

There is sometimes a difficulty in carrying into effect agreements to sell at a valuation, for if either party refuse to name a valuer, performance cannot be enforced; and where, by naming valuers beforehand, or by proper stipulations in the contract, that obstacle is avoided, there may still exist difficulties in the way of proving that the arbitrator has in every respect observed his authority. See *Emery* v. *Wase*, 5 Ves. 846; *Cooth* v. *Jackson*, 6 Ves. 17; *Milnes* v. *Gery*, 14 Ves. 408; *Hopcraft* v. *Hickman*, 2 Sim. & St. 130; *Anderson* v. *Wallace*, 3 Cl. & F. 26; *Caledonian Rail. Co.* v. *Lockhart*, 3 Macq. 808.

Submission by rule of Court.

References by Rule of Court.]—When an action has been entered for trial (*b*), the usual practice is to allow the cause to be called on at Nisi Prius, and then to take a verdict by consent for the full amount of damages laid in the statement of claim, subject to the award of an arbitrator agreed upon by the parties; the reference being made a rule of Court (*c*). These references can only be made upon consent of both parties. The reference is taken after verdict, where the defendant has been held to bail, because a reference before verdict is a discharge of the bail: 2 Saund. 72 b. In other cases (*d*), it seems to be immaterial at what stage of

Reference of causes.

(*b*) The sheriff has no authority by consent of parties to refer a cause tried before him upon a writ of trial under the stat. 3 & 4 Will. 4, c. 42, for arbitration; the object of sending cases to be so tried being, that the parties should not be put to the expense of trying before a judge at Nisi Prius, or referring to arbitration cases of so simple a nature and of so small an amount: *Wilson* v. *Thorpe*, 6 M. & W. 721; *Harrison* v. *Greenwood*, 15 L. J., Q. B. 92.

Sheriff cannot refer cause.

(*c*) Sometimes the arbitrator is authorized to direct a verdict to be entered; see as to this *infra*, p. 161. The Court may now, with the consent of all parties under no disability, order a matter or cause to be tried before an official referee. See stat. 47 & 48 Vict. c. 61, s. 9.

(*d*) As to replevin, see *Moore* v. *Bowmaker*, 7 Taun. 97; *Archer* v. *Hale*, 4 Bing. 464; *Aldridge* v. *Harper*, 10 Bing. 118; *Michael* v. *Myers*, 6 Man. & Gr. 702.

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the proceedings the rule or order is made. And the verdict is taken for the full amount of damages laid, because the arbitrator cannot go beyond the verdict, nor will the Court allow the declaration and verdict to be amended, pending a reference: *Pearse* v. *Cameron*, 1 Mau. & S. 675; *Prentice* v. *Reed*, 1 Taun. 151; *Bonner* v. *Charlton*, 5 East, 139.

Submission of matters out of the cause.

However, as a reference may be made, not merely of the matter in difference in the cause, but of all matters in difference between the parties (see *Malcolm* v. *Fullarton*, 2 T. R. 645; *Smith* v. *Muller*, 3 T. R. 624), it would seem that the arbitrator may where the reference is so taken, award a larger sum than that laid in the statement of claim, for which, though the party would not have a remedy under the verdict, he might have a remedy under the award: *Pearse* v. *Cameron*, 1 Mau. & S. 675. But, in *Bonner* v. *Charlton*, 5 East, 139, where the reference appears to have been generally of all matters in difference between the parties, and the arbitrator awarded a sum beyond the verdict, it was held that no assumpsit could be implied to pay the amount awarded, or even the amount for which the verdict was taken. And see *Hayward* v. *Phillips*, 1 Nev. & P. 288. Upon a private reference by bond, the arbitrator may go beyond the penalty; and though the sum awarded cannot be recovered upon the bond, the performance of the award may be compelled by attachment: *Browes* v. *Bruce*, Wats. Arbitr. 5, n.

Effect of submission on proceedings.

The reference has been said not to be a stay of proceedings in the cause, unless it is so expressed in the rule of Court: 2 Ld. Raym. 789. But it is doubtful how far this rule would be followed at the present day. See *Williams* v. *Gwynne*, 2 H. & W. 312; *Fontaine-Moreau* v. *Encontre*, 4 D. & L. 425. When it is intended that proceedings shall be stayed pending the reference, it is well that the submission should contain a clause to that effect. Of course when the submission is revoked, or it becomes from other causes impossible to go on with the reference, the parties are at liberty to proceed; and unless the defendant consents to a new reference, the plaintiff may sue out execution on the verdict, if it has been

taken, for the full damages: *Harper* v. *Abrahams*, 4 Moo. 3; *Woolley* v. *Kelly*, 1 B. & C. 68; *Crawshay* v. *Collins*, 1 Swanst. 40; *Hall* v. *Rouse*, 4 M. & W. 24. Submissions to Arbitration.

By sect. 11 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), it is enacted:—

"Whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree (*d*) that any then existing or future differences between them, or any of them, shall be referred to arbitration; and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against the other party or parties, or any of them, or against any person or persons claiming through or under him or them, in respect of the matters so agreed to be referred, or any of them; it shall be lawful for the Court in which the action or suit is brought, or a judge thereof, on application by the defendant or defendants, or any of them, after appearance and before plea or answer (*e*) upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration, according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit, and still is ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise, as to such Court or judge may seem fit: provided always, that any such rule or order may at any time afterwards be discharged or varied as justice may require." If action commenced by one party after all have agreed to arbitration, the Court or judge may stay proceedings.

Reference to arbitration, within the meaning of this section, includes reference of all disputes between the parties to the decision of a foreign tribunal: *Law* v. *Garrett*, 8 Ch. D. 26. In order to bring a case within this section, there must be a subsisting agreement to refer capable of being performed at the time of the application, so that if the submission (not having been made a rule of Court) is revoked, there is no such subsisting agreement,

(*d*) A reference by agreement to an official referee under the Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 11, is an agreement to refer within the above section. See *post*, p. 107.

(*e*) Now statement of defence.

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and the section does not apply: *Randell* v. *Thompson*, 1 Q. B. D. 748.

Unless some reason is shown to the contrary, the Court will generally presume that a dispute is capable of being referred to arbitration: *Hodgson* v. *Railway Passengers Ass. Co.*, 9 Q. B. D. 188. But the Court has refused in its discretion to stay proceedings in cases where the question raised was one of fraud *primâ facie* made out: *Wallis* v. *Hirsch*, 1 C. B., N. S. 316; *Lury* v. *Pearson*, 1 C. B., N. S. 639. See also *Young* v. *Buckett*, 46 L. T., N. S. 266; *S. C.*, 51 L. J., Ch. D. 504, a case in which an action for accounts of a partnership were instituted by the personal representatives of a deceased partner. But the mere bringing of a charge of fraud is not a sufficient ground of objection; *Russell* v. *Russell*, 14 Ch. D. 471; and where the question in dispute has been one of construction, *Randegger* v. *Holmes*, L. R., 1 C. P. 679, or of matters of fact, *Minifie* v. *Railway Passengers Ass. Co.*, 44 L. T., N. S. 552, not involving any suggestion of fraud, the Court has held that applications for stay of proceedings could be insisted on. See *Wickham* v. *Harding*, 28 L. J., Ex. 215; *Plews* v. *Baker*, L. R., 16 Eq. 564, as to circumstances under which the Court will stay proceedings. See also *Russell* v. *Pelligrini*, 6 E. & B. 1020; *Daunt* v. *Lazard*, 27 L. J., Ex. 399; *Pennell* v. *Walker*, 18 C. B. 651; *Seligmann* v. *Le Boutillier*, L. R., 1 C. P. 681. Where several parties have agreed that certain disputes shall be referred, and an action is brought by one of them, the subsequent unwillingness of one of the defendants to have the matter referred is not a sufficient objection to an order to stay proceedings: *Willesford* v. *Watson*, L. R., 8 Ch. 473.

At common law an award could not be set aside for the misbehaviour of the arbitrators.

An award, where the submission was by bond or other writing, or by parol, could not formerly be set aside at common law for the misbehaviour of the arbitrators, but the remedy was by a bill in equity: *Veale* v. *Warner*, 1 Saund. 327; *Greenhill* v. *Church*, 3 Rep. in Ch. 88, p. 49; 2 Vern. 101, pl. 95.

Where the submission

But where the submission to arbitration was by rule

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of Court, if on examination it appeared that the arbitrators had been partial and unjust, or had mistaken the law, the Court would not enforce a performance of the award: *Morris* v. *Reynolds*, 1 Salk. 73; *Forster* v. *Brunetti*, 1 Salk. 83; *Darbyshire* v. *Cannon*, 1 Mod. 21; *Lucas* v. *Wilson*, 2 Bur. 701. If, however, the conduct of the arbitrators was unimpeachable, the Court would compel the performance of the award by *attachment*, as for a contempt of a rule of Court: *Forster* v. *Brunetti*, 1 Salk. 83 (*e*). And whereas it was found by experience, that the enforcing of the performance of awards by attachment had contributed much to the ease of the subject, in the determination of controversies, because the parties became thereby obliged to submit to the award of the arbitrators, under the penalty of imprisonment for their contempt in case they refused submission, the statute 9 & 10 Will. 3, c. 15, intituled, "An Act for determining Differences by Arbitration," enacted as follows:—

was by rule of Court, the award may be set aside for misconduct.

9 & 10 Will. 3, c. 15.

Sect. 1. "That it shall and may be lawful for all merchants and traders, and others desiring to end any controversy, suit, or quarrel, controversies, suits, or quarrels, for which there is no other remedy but by personal action or suit in equity, by arbitration to agree that their submission of their suit to the award or umpirage of any person or persons should be made a rule of any of his Majesty's Courts of Record which the parties shall choose, and to insert such their agreement in their submission, or the condition of the bond or promise whereby they oblige themselves respectively to submit to the award or umpirage of any person or persons; which agreement being so made and inserted in their submission or promise, or condition of their respective bonds, shall or may, upon producing an affidavit thereof, made by the witnesses thereunto, or any one of them (*f*), in the Court of

Merchants and traders, &c. desiring to end controversies by arbitration, may agree that their submission shall be made a rule of Court.

Agreement so made, to be inserted in their submission, &c.

(*e*) In order to impeach an award for partial, corrupt or improper conduct in the arbitrators, application should be made to the Court to set it aside. See as to this *infra*, p. 183 *et seq.*

(*f*) It is no longer necessary that the affidavit should be made by a witness. See sects. 17 and 26 of the Common Law Procedure Act, 1854; see also *In re Dierdon*, 10 L. T., N. S. 690.

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which the same is agreed to be made a rule, and reading and filing the said affidavit in Court, be entered of record in such Court, and a rule shall thereupon be made by the said Court, that the parties shall submit to and finally be concluded by the arbitration or umpirage which shall be made concerning them by the arbitrators or umpire, pursuant to such submission; and in case of disobedience to such arbitration or umpirage, the party neglecting or refusing to perform and execute the same, or any part thereof, shall be subject to all the penalties of contemning a rule of Court, when he is a suitor or defendant in such Court; and the Court on motion shall issue process accordingly, which process shall not be stopped or delayed in its execution by any order, rule, command, or process of any other Court, either of law or equity, unless it shall be made appear on oath to such Court, that the arbitrators or umpire misbehaved themselves, and that such award, arbitration, or umpirage was procured by corruption, or other undue means."

Parties to be finally concluded by such arbitration.

In case of disobedience, party neglecting subject to penalty, &c.,

unless arbitrators misbehave themselves.

Sect. 2. "That any arbitration or umpirage procured by corruption or undue means, shall be judged and esteemed void and of none effect, and accordingly be set aside by any Court of law or equity, so as complaint of such corruption or undue practice be made in the Court where the rule is made for submission to such arbitration or umpirage, before the last day of the next term (*g*) after such arbitration or umpirage made and published to the parties; anything in this act contained to the contrary notwithstanding."

Corrupt arbitration void, and may be set aside, &c.

What cases within the statute.

The statute is confined to controversies, suits and quarrels existing at the time of the submission, and which might then be the subject of an action, and does not apply to a case where there was no dispute between the parties, except that which was raised by the submission itself; as, where two persons agree by deed that one of them shall purchase property belonging to the other at a price to be fixed by arbitration: *Re Lee and Hemingway*, 3 Nev. & M. 860. Nor does it apply to any other agreement relating to a suit than a submission to arbitra-

(*g*) Now of the "next sittings." See Ord. LXIV. r. 14, *post*, p. 188. Service of notice of motion amounts to a "complaint" within this section: *Smith* v. *Parkside Mining Co.*, 6 Q. B. D. 67.

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tion: *Steers* v. *Harrop*, 1 Bing. 133; 7 Moo. 466; *Lyall* v. *Lamb*, 4 B. & Ad. 468 (*h*).

The Act puts submissions to rule of Court on the same footing as those by rule of Court.

The first section of the statute enables parties to make a submission to arbitration by bond or other writing a rule of Court, and thereby puts such submission on the same footing with those by rule of Court. This Act is held to be only declaratory of what the law was before in cases where there was a cause depending: *Lucas* v. *Wilson*, 2 Bur. 701.

Reference by rule of Court.

By the second clause of the statute, an award may be set aside for the corruption of the arbitrators. Upon this clause, the Court cannot set aside an award made in pursuance of the statute, on any other ground but fraud or corruption in the arbitrators: *Anderson* v. *Coxeter*, 1 Str. 301. But though the Court cannot *set aside* the award upon any other ground, yet if there be any illegality or defect on the face of it, the Court will refuse to enforce the award by attachment, and will leave the party to an action on the bond, or on the award itself: *Hutchins* v. *Hutchins*, Andr. 297. See also *Wrightson* v. *Bywater*, 3 M. & W. 199; *Lord* v. *Lord*, 5 E. & B. 404. For it is discretionary in the Court, whether they will enforce the award by process of contempt or not: *Hales* v. *Taylor*, 1 Str. 695; *Pedley* v. *Goddard*, 7 T. R. 73.

Parol submission.

This statute does not give the Court authority to make a *verbal* submission a rule of Court: *Ansell* v. *Evans*, 7 T. R. 1; *Godfrey* v. *Wade*, 6 Moo. 488.

As to setting aside an award.

So, it is held, that the statute does not apply to submissions by *rule of Court*, or by order of *Nisi Prius*; therefore, that it is not necessary in such case to apply to set aside the award within the time limited by the statute: *Dubois* v. *Medlycott*, Barnes, 55; *Lucas* v. *Wilson*, 2 Bur. 701; *Synge* v. *Jervoise*, 8 East, 466. A submission agreed

(*h*) Where, however, an agreement makes it a condition precedent to a right of action that the amount of damages shall be ascertained by arbitration, the amount must be thus ascertained before an action can be brought: *Scott* v. *Avery*, 5 H. L. C. 811. See also *Edwards* v. *Aberayron Mutual Ship Ins. Co.*, 1 Q. B. D. 563. Proof must be given of the execution of the submission by the parties before it can be made a rule of Court: *Re Henshaw and Falk*, 12 L. T., N. S. 638.

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to be made a rule of Court under the statute will exclude the jurisdiction of the Courts to relieve against the award: *Gwinnett* v. *Bannister*, 14 Ves. 530; *Dawson* v. *Sadler*, 1 Sim. & St. 537; *Auriol* v. *Smith*, Turn. & R. 121; *Nichols* v. *Roe*, 3 My. & K. 431. In *Rogers* v. *Dallimore*, 1 Marsh. 471; 6 Taun. 111, it was held that the limitation of the Act applied only to cases where an original authority was given by it: and that where a cause was referred to arbitration, it was discretionary with the Court to afford relief, even though the time limited by the Act of Parliament had elapsed. But, in the exercise of this discretion, the Court declared that although under particular circumstances they might think proper to interfere, yet they by no means intended to hold out that applications to set aside awards, where the submission had not been entered into by bond, might be made at any distance of time.

In *Auriol* v. *Smith*, Turn. & R. 121, Lord *Eldon* decided, "That a Court of equity was precluded from entertaining a suit which had been made a rule of Court under the statute, after the time allowed by the statute had expired."

Stat. 3 & 4 Will. 4, c. 42, ss. 39, 40, 41 (*i*).

The Act for the further amendment of the law, 3 & 4 Will. 4, c. 42, has the following provisions respecting arbitration:—

Submission to arbitration by rule of Court, &c. not revocable without leave of Court.

Sect. 39 enacts, "That the power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of Court, or judge's order, or order of Nisi Prius, in any action now brought, or which shall be hereafter brought, or by or in pursuance of any submission to reference, containing an agreement that such submission shall be made a rule of any of his Majesty's Courts of Record, shall not be revocable by any party to such reference without the leave of the Court (*k*) by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge; and the arbitrator or umpire

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(*i*) See for corresponding provisions as to Ireland, stat. 3 & 4 Vict. c. 105, sects. 63, 64, 65.

(*k*) If the agreement does not provide that the submission shall be made a rule of Court, it may be revoked without leave of the Court: *Re Rouse and Meier*, L. R., 6 C. P. 212; *Re Fraser*, 12 Q. B. D. 310.

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shall and may, and is hereby required to proceed with the reference, notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference; and that the Court, or any judge thereof, may from time to time enlarge the term for any such arbitrator (*l*) making his award."

Court or judge may enlarge time.

Sect. 40. "That when any reference shall have been made by any such rule or order as aforesaid, or by any submission containing such agreement as aforesaid, it shall be lawful for the Court by which such rule or order shall be made, or which shall be mentioned in such agreement, or for any judge by rule or order to be made for that purpose, to command the attendance and examination of any person to be named, or the production of any documents to be mentioned in such rule or order; and the disobedience to any such rule or order shall be deemed a contempt of Court, if, in addition to the service of such rule or order, an appointment of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators, or by the umpire before whom the attendance is required, shall be served, either together with or after the service of such rule or order. Provided always, that every person whose attendance shall be so required shall be entitled to the like conduct-money and payment of expenses, and for loss of time, as for and upon attendance at any trial: Provided also, that the application made to such Court or judge for such rule or order shall set forth the county where such witness is residing at the time, or satisfy such Court or judge that such person cannot be found: Provided also, that no person shall be compelled to produce under any such rule or order any writing, or other document, that he would not be compelled to produce at a trial, or to attend more than two consecutive days, to be named in such order."

Power to compel the attendance of witnesses and production of documents.

Witnesses' costs.

Application for rule.

Sect. 41. "That where in any rule or order of reference, or in any submission to arbitration containing an agreement that the submission shall be made a rule of Court, it shall be ordered or agreed that the witnesses upon such reference shall be examined upon oath, it shall be lawful for the arbitrators or umpire or any one arbitrator, and he or they are hereby authorized and required, to administer an oath to such witnesses, or take their affirmation in cases where affirmation is allowed by law, instead of oath; and if, upon such oath or affirmation, any person making the

Arbitrators may administer an oath.

(*l*) The term "arbitrator" here includes "umpire:" *Bowen* v. *Williams*, 3 Ex. 93; *Johnson* v. *Collie*, 24 L. J., Q. B. 64. As to enlargement of time by the Court, see sect. 15 of the Common Law Procedure Act, 1854, *post*, p. 145.

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same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall be prosecuted and punished accordingly."

Criminal matters.

Both the stat. 9 & 10 Will. 3, c. 15, and the above clauses of the stat. 3 & 4 Will. 4, c. 42, apply to civil proceedings only, and therefore a submission of criminal matters is still revocable: *Rex* v. *Bardell*, 1 Nev. & P. 74; 5 A. & E. 619; *Rex* v. *Shillibeer*, 5 Dowl. 238. Felonies are altogether incapable of reference: *Mason* v. *Watkins*, 2 Vent. 109; *Drage* v. *Ibberson*, 2 Esp. 643. But misdemeanors are in some cases capable of being settled by arbitration. The rule is thus stated by *Gibbs*, C. J., in the case of *Baker* v. *Townshend*, 1 Moo. 120:—"Where a party injured has a remedy by action, as well as by indictment, nothing can deter such party from referring the adjustment of the reparation which he is to receive to arbitration, although a criminal prosecution may have been commenced." And in a later case, Lord *Denman*, C. J., said, "That the law will permit a compromise of all offences for which the injured party might sue and recover damages in an action. But if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling the prosecution of it:" *Keir* v. *Leeman*, 6 Q. B. 308.

The following offences have been held to be incapable of reference or compromise, as being matters of public concern:—riot and obstruction of public officers; *Keir* v. *Leeman*, *ubi supra;* perjury; *Reg.* v. *Hardey*, 14 Q. B. 529; offences against the Toleration Act; *Edgcombe* v. *Rodd*, 5 East, 294; non-repair of highways; *Reg.* v. *Blakemore*, 14 Q. B. 544; but indictable nuisances have been repeatedly held to be capable of reference with leave of the judge: *Dobson* v. *Groves*, 6 Q. B. 637; *R.* v. *Moate*, 3 B. & Ad. 237; *Reg.* v. *Gore*, 8 Dowl. 102. Agreements to forbear causing a bankrupt to be examined as to moneys not accounted for, or to drop proceedings for striking a solicitor off the rolls, are void: *Nerot* v. *Wallace*, 3 T. R. 17; *Pool* v. *Bousfield*, 1 Camp. 55. And see Russ. Arbitr. 10.

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If an indictment is pending, leave of the Court to refer to arbitration should be obtained: *R.* v. *Bardell*, *R.* v. *Hardey*, *ubi supra.*

If the parties consent that the *award* shall be made a rule of Court, the submission may be made a rule of Court.

In *Harrison* v. *Grundy*, 2 Str. 1178, it was held that a consent in the submission bond, to make the award a rule of Court, instead of the submission, would not warrant the interposition of the Court, under the stat. 9 & 10 Will. 3, c. 15. See also *Anon.*, 2 Barnard. 163. However, in *Pedley* v. *Westmacot*, 3 East, 603, the Court referred to the case of *Powell* v. *Phillips*, E. 30, Geo. 3, 2 Tidd's Prac. 9th edit. 821, where the submission bond, stating that the award should be made a rule of Court instead of the agreement, was holden to be no objection; and this, Lord *Ellenborough* said, was the later and more sensible determination, and therefore the objection in *Harrison* v. *Grundy* was overruled. See also *Soilleux* v. *Herbst*, 2 Bos. & P. 444; *In re Story*, 2 Nev. & P. 667; 7 A. & E. 602. But the proper and usual method is to agree that the submission shall be made a rule of Court.

By sect. 17 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), it is enacted that:—

Agreement or submission in writing may be made a rule of Court, unless a contrary intention appears.

"Every agreement or submission to arbitration by consent, whether by deed or instrument in writing, not under seal, may be made a rule of any one of the superior Courts of law or equity at Westminster, on the application of any party thereto, unless such agreement or submission contain words purporting that the parties intend that it should not be made a rule of Court; and if in any such agreement or submission it is provided that the same shall or may be made a rule of one in particular of such superior Courts, it may be made a rule of that Court only; and if when there is no such provision a case be stated in the award for the opinion of one of the superior Courts, and such Court be specified in the award, and the document authorizing the reference have not, before the publication of the award to the parties, been made a rule of Court, such document may be made a rule only of the Court specified in the award; and when in any case the document authorizing the reference is or has been made a rule or order of any one of such superior Courts, no other of such Courts shall have any jurisdiction to entertain any motion respecting the arbitration or award."

By the Judicature Act, 1884 (47 & 48 Vict. c. 61), sect. 11, parties under an agreement of reference

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may agree that any existing or future difference between them shall be referred to an official referee; "and every such agreement shall be deemed to be an agreement to refer to arbitration within the meaning of sects. 11 and 17 of the Common Law Procedure Act, 1854."

APPOINTMENT OF ARBITRATORS UNDER SUBMISSIONS BY CONSENT.

Appointment of Arbitrators under Submissions by Consent.]—With regard to submissions by consent, the Common Law Procedure Act, 1854, enacts as follows:—

Stat. 17 & 18 Vict. c. 125, ss. 12, 13.

On failure of parties or arbitrators, judge may appoint single arbitrator or umpire.

Sect. 12. "If in any case of arbitration the document authorizing the reference provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator; or if any appointed arbitrator refuse to act, or become incapable of acting, or die, and the terms of such document do not show that it was intended that such vacancy should not be supplied, and the parties do not concur in appointing a new one; or if, where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator, such parties or arbitrators do not appoint an umpire or third arbitrator; or if any appointed umpire or third arbitrator refuse to act, or become incapable of acting, or die, and the terms of the document authorizing the reference do not show that it was intended that such a vacancy should not be supplied, and the parties or arbitrators respectively do not appoint a new one; then in every such instance any party may serve the remaining parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator respectively; and if within seven clear days after such notice shall have been served no arbitrator, umpire, or third arbitrator be appointed, it shall be lawful for any judge of any of the superior Courts of law or equity at Westminster, upon summons to be taken out by the party having served such notice as aforesaid, to appoint an arbitrator, umpire, or third arbitrator, as the case may be, and such arbitrator, umpire, or third arbitrator respectively shall have the like power to act in the reference and make an award as if he had been appointed by consent of all parties."

Where reference is to two arbitrators, and one party fails to appoint, other party may appoint arbi-

Sect. 13. "When the reference is or is intended to be to two arbitrators, one appointed by each party, it shall be lawful for either party, in the case of the death, refusal to act, or incapacity of any arbitrator appointed by him, to substitute a new arbitrator, unless the document authorizing the reference show that it was intended that the vacancy should not be supplied; and if

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on such reference one party fail to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party shall have appointed an arbitrator, and shall have served the party so failing to appoint with notice in writing to make the appointment, the party who has appointed an arbitrator may appoint such arbitrator to act as sole arbitrator in the reference, and an award made by him shall be binding on both parties as if the appointment had been made by consent; provided, however, that the Court or a judge may revoke such appointment, on such terms as shall seem just."

trator to act alone.

Where the reference indicated in the agreement is merely as to amount of compensation or purchase-money, there is no arbitration of an existing or future difference, so as to enable one party to appoint his referee sole arbitrator on failure of the other party to appoint: *Collins* v. *Collins*, 26 Beav. 306; *Bos* v. *Helsham*, L. R., 2 Ex. 72.

The provisions of sect. 13 do not apply where the reference is to three arbitrators, one to be appointed by each of the parties, and the third to be chosen by the two arbitrators so appointed: *Gumm* v. *Hallett*, L. R., 14 Eq. 555; *Fraser* v. *Ehrensperger*, 12 Q. B. D. 310.

SUBMISSIONS UNDER STATUTORY ENACTMENTS.

Submissions under the Lands Clauses Consolidation Act, 1845, &c.]—After some difference of opinion, it seems to be now settled that arbitrations under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), are arbitrations by consent within the Common Law Procedure Act, 1854: *Re Dare Valley Rail. Co.*, L. R., 4 Ch. 554; *Ex parte Harper*, L. R., 18 Eq. 539; *Rhodes* v. *Airedale Drainage Commissioners*, 1 C. P. D. 402.

The Lands Clauses Consolidation Act, 1845.

The first branch of the question of arbitration under the Lands Clauses Consolidation Act, 1845, is with respect to cases in which the promoters of an undertaking authorized by Act of Parliament have given notice, under sect. 18, to the parties interested, or by the Act enabled to sell and convey, that lands authorized by the special Act to be taken are required for the purposes of the undertaking. If the amount of compensation claimed by any party interested does not exceed 50*l.*, any dispute with regard to such claim is to be settled by

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two justices, as provided in sects. 22, 24. But if the purchase-money or compensation claimed exceeds 50*l.*, then, in case of dispute, the question is to be settled by arbitration in manner following:—

Compensation exceeding 50*l.* to be settled by arbitration or jury, at the option of the party claiming compensation.

Sect. 23. "If the compensation claimed or offered in any such case shall exceed fifty pounds, and if the party claiming compensation desire to have the same settled by arbitration, and signify such desire by notice in writing to the promoters of the undertaking, before they have issued their warrant to the sheriff to summon a jury in respect of such lands, under the provisions hereinbefore contained, stating in such notice the nature of the interest in respect of which such party claims compensation, and the amount of the compensation so claimed, the same shall be so settled accordingly; but unless the party claiming compensation shall as aforesaid signify his desire to have the question of such compensation settled by arbitration, or if when the matter shall have been referred to arbitration the arbitrators or their umpire shall for three months have failed to make their or his award, or if no final award shall be made, the question of such compensation shall be settled by the verdict of a jury, as hereinafter provided."

Appointment of arbitrators when questions are to be determined by arbitration.

Sect. 25 (*a*). "When any question of disputed compensation by this or the special Act, or any Act incorporated therewith, authorized or required to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall nominate and appoint an arbitrator, to whom such dispute shall be referred; and every appointment of an arbitrator shall be made on the part of the promoters of the undertaking under the hands of the said promoters or any two of them, or of their secretary or clerk, and on the part of any other party under the hand of such party, or if such party be a corporation aggregate under the common seal of such corporation; and such appointment shall be delivered to the arbitrator, and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made; and after any such appointment shall have been made neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as a revocation; and if for the space of fourteen days after any such dispute shall have arisen, and after a request in writing, in which shall be stated the matter so required to be referred to arbitration, shall have been served by the one party on the other party to appoint

(*a*) Sect. 24 relates to the settlement of disputes as to compensation by justices.

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an arbitrator, such last-mentioned party fail to appoint such arbitrator, then upon such failure the party making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties, and such arbitrator may proceed to hear and determine the matters which shall be in dispute, and in such case the award or determination of such single arbitrator shall be final."

Vacancy of arbitrator to be supplied.

Sect. 26. "If, before the matters so referred shall be determined, any arbitrator appointed by either party die, or become incapable, the party by whom such arbitrator was appointed may nominate and appoint in writing some other person to act in his place, and if, for the space of seven days after notice in writing from the other party for that purpose, he fail to do so, the remaining or other arbitrator may proceed ex parte, and every arbitrator so to be substituted as aforesaid shall have the same powers and authorities as were vested in the former arbitrator at the time of such his death or disability as aforesaid."

Appointment of umpire.

Sect. 27. "Where more than one arbitrator shall have been appointed, such arbitrators shall, before they enter upon the matters referred to them, nominate and appoint, by writing under their hands, an umpire to decide on any such matters on which they shall differ, or which shall be referred to him under the provisions of this or the special Act, and if such umpire shall die, or become incapable to act, they shall forthwith, after such death or incapacity, appoint another umpire in his place, and the decision of every such umpire on the matters so referred to him shall be final."

Board of Trade in case of railway companies, and two justices in any other case, empowered to appoint an umpire on neglect of the arbitrators.

Sect. 28. "If in either of the cases aforesaid the said arbitrators shall refuse, or shall, for seven days after request of either party to such arbitration, neglect to appoint an umpire, the Board of Trade, in any case in which a railway company shall be one party to the arbitration, and two justices in any other case, shall, on the application of either party to such arbitration, appoint an umpire, and the decision of such umpire on the matters on which the arbitrators shall differ, or which shall be referred to him under this or the special Act, shall be final."

In case of death of single arbitrator, the matter to begin de novo.

Sect. 29. "If, when a single arbitrator shall have been appointed, such arbitrator shall die or become incapable to act before he shall have made his award, the matters referred to him shall be determined by arbitration under the provisions of this or the special Act in the same manner as if such arbitrator had not been appointed."

If either arbitrator refuse to act, the other is to proceed ex parte.

Sect. 30. "If, where more than one arbitrator shall have been appointed, either of the arbitrators refuse or for seven days neglect to act, the other arbitrator may proceed ex parte, and the

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decision of such other arbitrator shall be as effectual as if he had been the single arbitrator appointed by both parties."

If the arbitrators fail to make their award within twenty-one days, or extended time, the matter is to go to the umpire.

Sect. 31. "If, where more than one arbitrator shall have been appointed, and where neither of them shall refuse or neglect to act as aforesaid, such arbitrators shall fail to make their award within twenty-one days after the day on which the last of such arbitrators shall have been appointed, or within such extended time (if any) as shall have been appointed for that purpose by both such arbitrators, under their hands, the matters referred to them shall be determined by the umpire to be appointed as aforesaid."

Power of arbitrators to call for books, &c.

Sect. 32. "The said arbitrators or their umpire may call for the production of any documents in the possession or power of either party which they or he may think necessary for determining the question in dispute, and may examine the parties or their witnesses on oath, and administer the oaths necessary for that purpose."

Sect. 33. "Before any arbitrator or umpire shall enter into the consideration of any matters referred to him, he shall in the presence of a justice make and subscribe the following declaration, that is to say:—

Arbitrator or umpire to make a declaration.

'I, A. B., do solemnly and sincerely declare, that I will faithfully and honestly, and to the best of my skill and ability, hear and determine the matters referred to me under the provisions of the Act [*naming the special Act*]. A. B.

'Made and subscribed in the presence of .'

And such declaration shall be annexed to the award when made; and if any arbitrator or umpire having made such declaration shall wilfully act contrary thereto he shall be guilty of a misdemeanor."

Costs of arbitration, how to be borne (*l*).

Sect. 34. "All the costs of any such arbitration, and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions."

Award to be delivered to the promoters of the undertaking.

Sect. 35. "The arbitrators shall deliver their award in writing to the promoters of the undertaking, and the said promoters shall retain the same, and shall forthwith, on demand, at their own expense, furnish a copy thereof to the other party to the arbitration, and shall at all times, on demand, produce the said award,

(*l*) By the Lands Clauses Consolidation Act, 1869 (32 & 33 Vict. c. 18), sect. 1, the costs of the reference and award are to be taxed if either party requires it.

and allow the same to be inspected or examined by such party or any person appointed by him for that purpose."

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By sect. 36 it is provided that a submission may be made a rule of Court.

Another important class of cases capable of being referred to arbitration under this Act is where the promoters have taken possession of land without payment of the purchase-money, or have injuriously affected by the execution of their works land which they have not taken, and do not require to take. See Frend & Ware's Rail. Prec. p. 81. With regard to these cases, sect. 68 enacts as follows:—

Lands taken for, or injuriously affected by works, &c.

"If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith, and if the compensation claimed in each case shall exceed the sum of fifty pounds, such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit; and if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein; and unless the promoters of the undertaking be willing to pay the amount of the compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided."

A tenant for a term of years may have recourse to this section if his land be either taken, or injuriously affected: *Healey* v. *Thames Valley Rail. Co.*, 13 W. R. 44. A tenant from year to year can only do so in the latter case; *Reg.* v. *Manchester, &c. Rail. Co.*, 4 E. & B. 88; *Knapp* v. *London, Chatham and Dover Rail. Co.*, 11 W. R. 890: his claim for compensation for land taken is to be settled by two justices under sect. 121 of the Act.

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Other cases which may under this Act be referred to arbitration are, where a person, in whose absence from the kingdom the compensation for land taken has been assessed by a surveyor, is dissatisfied with the valuation (see sect. 64); where lands are severed (sect. 94); where interests are omitted to be included (sects. 124—126); and as to price of surplus lands.

The proceedings in all cases of arbitration under the Act are regulated by the provisions contained in sects. 25—37: *vide supra*.

References under the Railways Clauses Consolidation Act, 1845.

Similar provisions as to references to arbitration are contained in the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), except that every appointment of an arbitrator on behalf of the company is to be made "under the hand of the secretary, or any two of the *directors*" (sect. 126); and the costs of the arbitration, unless otherwise provided, are to be in the discretion of the arbitrators (sect. 135).

Disputes between railway companies.

As to references to arbitration of disputes between two or more "Railway Companies," including in that term "all persons being the owners or lessees of, and all contractors working any railway upon which steam power is used," see the Railway Companies Arbitration Act, 1859 (22 & 23 Vict. c. 59), and the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48). The latter statute applies also to disputes between canal companies, or between a railway company and a canal company. An agreement for reference under this statute excludes the jurisdiction of the Railway Commissioners: *Great Western Rail. Co.* v. *Waterford, &c. Rail. Co.*, 17 Ch. D. 493.

Other statutes relating to arbitration.

Other statutes providing for referring disputes to arbitration have from time to time been passed: of these the principal are as follows—(i.) concerning masters and workmen, stats. 5 Geo. 4, c. 96; 1 Vict. c. 67; 35 & 36 Vict. c. 46; (ii.) concerning artizans and labourers' dwellings, stats. 38 & 39 Vict. c. 36; 42 & 43 Vict. cc. 63, 64; 45 & 46 Vict. c. 54; (iii.) concerning public health, stat. 38 & 39 Vict. c. 55; (iv.) concerning factories and workshops,

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stat. 41 Vict. c. 16; (v.) concerning the manufacture, custody, &c. of explosives, stat. 38 & 39 Vict. c. 17; (vi.) concerning Building Societies, 37 & 38 Vict. c. 42.

References under the Agricultural Holdings Act, 1883.

The Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), contains the following provisions with regard to compensation for unexhausted improvements, and the regulations and procedure to be observed in ascertaining the same.

Regulations as to compensation for improvements.

Sect. 6. "In the ascertainment of the amount of the compensation under this Act (*m*) payable to the tenant in respect of any improvement, there shall be taken into account in reduction thereof:

"(a) Any benefit (*n*) which the landlord has given or allowed to the tenant in consideration of the tenant executing the improvement; and

"(b) In the case of compensation for manures the value of the manure that would have been produced by the consumption on the holding of any hay, straw, roots, or green crops sold off or removed from the holding within the last two years of the tenancy, or other less time for which the tenancy has endured, except as far as a proper return of the manure to the holding has been made in respect of such produce so sold off or removed therefrom; and

"(c) Any sums due to the landlord in respect of rent, or in respect of any waste (*o*) committed or permitted by the

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(*m*) These deductions and augmentations are expressly made to apply to compensations under the Act (as to which see *post*, tit. Leases), but it seems doubtful whether they apply also to compensations by custom of the country or by agreement between landlord and tenant in lieu of compensations under the Act. If the landlord wishes to claim a deduction it will be well for him to give notice to this effect, although such notice is not expressly required, as in the case of a counter-claim. See sect. 7.

(*n*) The term "benefit" will include reduction of rent, doing repairs, allowance of materials or money for carrying out improvements, &c.

(*o*) Waste, as between landlord and tenant, may be defined to be spoil or destruction to houses, gardens, trees and lands, to the injury of the reversion: Woodfall, L. & T. 578. Waste is either voluntary or permissive. Voluntary or active waste is the destruction or alteration of a material part of the property, *e.g.* by pulling down buildings, removing fixtures, cutting down or topping timber trees or such as are accounted timber, ploughing up ancient meadows or converting arable land into wood, dig-

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tenant, or in respect of any breach of covenant or other agreement connected with the contract of tenancy committed by the tenant; also any taxes, rates and tithe rent-charge due or becoming due in respect of the holding to which the tenant is liable as between him and the landlord. There shall be taken into account in augmentation of the tenant's compensation—

"(d) Any sum due to the tenant for compensation in respect of a breach of covenant or other agreement connected with a contract of tenancy and committed by the landlord.

"Nothing in this section shall enable a landlord to obtain under this Act compensation in respect of waste by the tenant, or of breach by the tenant committed or permitted in relation to a matter of husbandry more than four years before the determination of the tenancy."

Notice of intended claim.

Sect. 7. "A tenant claiming compensation under this Act shall, two months at least before the determination of the tenancy, give notice in writing to the landlord of his intention to make such claim.

"Where a tenant gives such notice the landlord may, before the determination of the tenancy, or within fourteen days there-

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ging for gravel, lime and minerals, unless the quarries or mines were open at the commencement of the tenancy; Co. Litt. 53 a; Com. Dig. *Waste*, D. 4. So also ploughing up ancient meadow or ground used for fruit-growing: *Simmons* v. *Morton*, 7 Bing. 648; *Watherell* v. *Howell*, 1 Camp. 227. Sowing land with mustard seed or other pernicious crop: *Pratt* v. *Brett*, 2 Madd. 62.

What is accounted timber will vary according to the locality. "Oak, ash and elme, these be timber trees in all places:" Co. Litt. 53 a; but other trees may also be accounted as timber by the custom of particular districts, such as beech, hornbeam, white thorn, black thorn, and even some fruit trees, such as chestnut and walnut: *Duke of Chandos* v. *Talbot*, 2 P. Wms. 606.

No trees, however, are timber until they are of twenty years growth: *Foster* v. *Leonard*, Cro. Eliz. 1. Pollards would seem not to be timber except by custom of the district.

A tenant is entitled to take gravel, &c. even from unopened pits, and "convenient trees" for repairs: Co. Litt. 53 a. And if pits, quarries or mines were in work at the commencement of the tenancy, it is no waste for the tenant to continue to work them: *Clavering* v. *Clavering*, 2 P. Wms. 388; *Elias* v. *Snowdon Slate Quarries Co.*, 4 App. Ca. 454.

Permissive waste is neglect of repairs. So to suffer a sea wall to fall into decay, or to omit to repair river banks, is waste; Co. Litt. 53 a; Com. Dig. *Waste*, D. 4; or not to repair fences: *Cheetham* v. *Hampson*, 4 T. R. 318. Merely to leave land uncultivated is not waste at common law: *Hatton* v. *Warren*, 1 M. & W. 466. It is waste to permit the walls of buildings to decay for want of proper plastering: 2 Roll. Abr. 816, pl. 36, 37.

after, give a counter-notice in writing to the tenant of his intention to make a claim in respect of any waste or any breach of covenant or other agreement. Submissions to Arbitration.

"Every such notice and counter-notice shall state, as far as reasonably may be, the particulars and amount of the intended claim."

Sect. 8. "The landlord and tenant may agree on the amount and mode and time of payment of compensation to be paid under this Act. Compensation agreed or settled by reference.

"If in any case they do not so agree the difference shall be settled by a reference."

Sect. 9. "Where there is a reference under this Act, a referee, or two referees and an umpire, shall be appointed as follows:—

"(1.) If the parties concur, there may be a single referee appointed by them jointly:

"(2.) If before award the single referee dies or becomes incapable of acting, or for seven days after notice from the parties, or either of them, requiring him to act, fails to act, the proceedings shall begin afresh, as if no referee had been appointed:

"(3.) If the parties do not concur in the appointment of a single referee, each of them shall appoint a referee:

"(4.) If before award one of two referees dies or becomes incapable of acting, or for seven days after notice from either party requiring him to act, fails to act, the party appointing him shall appoint another referee:

"(5.) Notice of every appointment of a referee by either party shall be given to the other party:

"(6.) If for fourteen days after notice by one party to the other to appoint a referee, or another referee, the other party fails to do so, then, on the application of the party giving notice, the County Court shall within fourteen days appoint a competent and impartial person to be a referee:

"(7.) Where two referees are appointed, then (subject to the provisions of this Act) they shall, before they enter on the reference, appoint an umpire:

"(8.) If before award an umpire dies or becomes incapable of acting, the referees shall appoint another umpire:

"(9.) If for seven days after request from either party the referees fail to appoint an umpire, or another umpire, then, on the application of either party, the County Court shall within fourteen days appoint a competent and impartial person to be the umpire:

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"(10.) Every appointment, notice and request under this section shall be in writing."

Requisition for appointment of umpire by Land Commissioners, &c.

Sect. 10. "Provided that, where two referees are appointed, an umpire may be appointed, as follows:

"(1.) If either party, on appointing a referee, requires, by notice in writing to the other, that the umpire shall be appointed by the Land Commissioners for England, then the umpire, and any successor to him, shall be appointed, on the application of either party, by those Commissioners.

"(2.) In every other case, if either party on appointing a referee requires, by notice in writing to the other, that the umpire shall be appointed by the County Court, then, unless the other party dissents by notice in writing therefrom, the umpire, and any successor to him, shall on the application of either party be so appointed, and in case of such dissent the umpire, and any successor to him, shall be appointed, on the application of either party, by the Land Commissioners for England."

Exercise of powers of County Court.

Sect. 11. "The powers of the County Court under this Act relative to the appointment of a referee or umpire shall be exercisable by the judge of the Court having jurisdiction, whether he is without or within his district, and may, by consent of the parties, be exercised by the registrar of the Court."

Mode of submission to reference.

Sect. 12. "The delivery to a referee of his appointment shall be deemed a submission to a reference by the party delivering it, and neither party shall have power to revoke a submission, or the appointment of a referee, without the consent of the other."

Power for referee, &c. to require production of documents, administer oaths, &c.

Sect. 13. "The referee or referees or umpire may call for the production of any sample or voucher, or other document, or other evidence which is in the possession or power of either party, or which either party can produce, and which to the referee or referees or umpire seems necessary for determination of the matters referred, and may take the examination of the parties and witnesses on oath, and may administer oaths and take affirmations; and if any person so sworn or affirming wilfully and corruptly gives false evidence, he shall be guilty of perjury."

Power to proceed in absence.

Sect. 14. "The referee or referees, or umpire, may proceed in the absence of either party where the same appears to him or them expedient, after notice given to the parties."

Form of award.

Sect. 15. "The award shall be in writing, signed by the referee or referees, or umpire."

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Sect. 16. "A single referee shall make his award ready for delivery within twenty-eight days after his appointment.

"Two referees shall make their award ready for delivery within twenty-eight days after the appointment of the last appointed of them, or within such extended time (if any) as they from time to time jointly fix by writing under their hands, so that they make their award ready for delivery within a time not exceeding in the whole forty-nine days after the appointment of the last appointed of them."

Time for award of referee or referees.

Sect. 17. "In any case provided for by sections 3, 4, or 5, if compensation is claimed under this Act, such compensation as under any of those sections is to be deemed to be substituted for compensation under this Act, if and so far as the same can, consistently with the terms of the agreement, if any, be ascertained by the referees or the umpire, shall be awarded in respect of any improvements thereby provided for, and the award shall, when necessary, distinguish such improvements and the amount awarded in respect thereof; and an award given under this section shall be subject to the appeal provided by this Act."

Award in respect of compensation under sects. 3, 4, and 5.

Sect. 18. "Where two referees are appointed and act, if they fail to make their award ready for delivery within the time aforesaid, then, on the expiration of that time, their authority shall cease, and thereupon the matters referred to them shall stand referred to the umpire.

Reference to and award by umpire.

"The umpire shall make his award ready for delivery within twenty-eight days after notice in writing given to him by either party or referee of the reference to him, or within such extended time (if any) as the registrar of the County Court from time to time appoints, on the application of the umpire or of either party, made before the expiration of the time appointed by or extended under this section."

Sect. 19. "The award shall not award a sum generally for compensation, but shall, so far as possible, specify—

Award to give particulars.

"(a) The several improvements, acts, and things in respect whereof compensation is awarded, and the several matters and things taken into account under the provisions of this Act, in reduction or augmentation of such compensation;

"(b) The time at which each improvement, act, or thing was executed, done, committed, or permitted;

"(c) The sum awarded in respect of each improvement, act, matter, and thing; and

"(d) Where the landlord desires to charge his estate with the amount of compensation found due to the tenant, the time at which, for the purposes of such charge, each

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improvement, act, or thing in respect of which compensation is awarded is to be deemed to be exhausted."

Costs of reference.

Sect. 20. "The costs of and attending the reference, including the remuneration of the referee or referees and umpire, where the umpire has been required to act, and including other proper expenses, shall be borne and paid by the parties in such proportion as to the referee or referees or umpire appears just, regard being had to the reasonableness or unreasonableness of the claim of either party in respect of amount, or otherwise, and to all the circumstances of the case.

"The award may direct the payment of the whole or any part of the costs aforesaid by the one party to the other.

"The costs aforesaid shall be subject to taxation by the registrar of the County Court, on the application of either party, but that taxation shall be subject to review by the judge of the County Court."

Day for payment.

Sect. 21. "The award shall fix a day, not sooner than one month after the delivery of the award, for the payment of money awarded for compensation, costs, or otherwise."

Submission not to be removable, &c.

Sect. 22. "A submission or award shall not be made a rule of any Court, or be removable by any process into any Court, and an award shall not be questioned otherwise than as provided by this Act."

Amendment of Submission.]—A reference by private agreement, or by rule of Court, may be amended by consent (but generally, not otherwise), at any time before the award is made, and that by writing unsealed, notwithstanding the original submission was by deed. When parties have entered into a deed of submission or into arbitration bonds, with the usual agreement that the submission shall be made a rule of Court, and an agreement to enlarge the time is endorsed thereon, such agreement must be understood as by reference virtually incorporating in itself all the antecedent *agreements* between the parties relative to that subject, including the agreement contained in the condition of the bond, that the submission to arbitration should be made a rule of Court; and that, with reference to the enlarged time, instead of the time originally specified in the condition of the bond: *Evans* v. *Thomson*, 5 East, 189, 193.

In another case, where the submission to arbitration was under seal, and by indorsement signed by

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the parties, but not sealed, an arbitrator was substituted in the room of one of those named in the deed; the objection was taken that a deed could not be varied by parol, but was overruled by the Court: *In re Tunno and Bird*, 2 Nev. & M. 328; 5 B. & Ad. 488, 496. See *Taylor* v. *Parry*, 1 Scott, N. R. 576. The ground of these decisions appears to be, that the subsequent enlargement of time operates as a new submission, incorporating the terms of the former one, which is thereby abandoned as to the term which is varied by the new agreement. And the old obligation under seal would be discharged, because there would be no award made in pursuance of it.

If the new agreement relate to any matter within the Statute of Frauds, it must be reduced to writing, and signed according to the requisitions of the statute: *Walters* v. *Morgan*, 2 Cox, 369.

Parol enlargement of time.

Thus, too, if the parties attend the arbitrator, after the time appointed has expired, or do any other act which recognizes the subsistence of the reference, or the arbitrator's authority; that alone is evidence of a new agreement to submit to his award, and an award made accordingly will bind them: *Rex* v. *Hill*, 7 Price, 636; *Halden* v. *Glasscock*, 8 D. & R. 151; 5 B. & C. 390; *In re Hick*, 8 Taun. 694; *Leggett* v. *Finlay*, 3 Moo. & P. 629; *Lawrence* v. *Hodgson*, 1 Y. & J. 16. And even where the arbitrators appointed an umpire without authority, the parties having attended the umpire, were held to have bound themselves: *Matson* v. *Trower*, Ry. & M. 17.

What remedy upon a parol variation of a submission by specialty.

But, where the subsequent variation is not by matter of as high a nature as the original submission, the remedy on the original submission is gone. Thus, where a recognizance was entered into to pay such sum as B. should award, and afterwards, by rule of Court, C. was, by consent of parties, substituted as arbitrator in lieu of B.: it was held, that the recognizance was not forfeited by non-performance of C.'s award, the rule of Court not being a record, or of so high a nature: *Rex* v. *Bingham*, 3 Y. & J. 101. Again, in an action upon an arbitration bond, in which a time was

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limited for making the award, the declaration stated that the time was afterwards enlarged by the mutual consent of both parties, within which time the award was made, and then stated the breach, &c. Upon demurrer, Lord *Kenyon*, C. J., said, that the question was not then to be discussed, whether the party had not some remedy, but whether his remedy lay on the bond, to determine which, the Court must look to the bond; and there it appeared that the defendant had bound himself to abide by an award, under a penalty, if made within a given time; but that could never extend the penalty to an award made after that time under a new agreement; and to this the other Judges assented: *Brown* v. *Goodman*, cit. *Littler* v. *Holland*, 3 T. R. 592, n.

Defeazance to bond may be varied by deed.

In *Brown* v. *Goodman*, the agreement to enlarge the time named in the condition to a bond must have been oral, or by writing unsealed. See *Thompson* v. *Brown*, 7 Taun. 656; for it is settled, that the defeazance to an obligation under seal may be varied by deed before breach. See *Fowell* v. *Forest*, 2 Wms. Saund. 47, n.; *Greig* v. *Talbot*, 2 B. & C. 179; 3 D. & R. 446.

Parol abandonment.

A parol agreement to abandon a reference is no defence to an action on a bond for non-performance of an award duly made in pursuance of the bond: *Braddick* v. *Thompson*, 8 East, 344.

Amendment of rule of Court.

The Courts cannot vary the agreements of parties to a submission; *Pearman* v. *Carter*, 2 Chitt. 29; see also *Vanderbyl* v. *M'Kenna*, L. R., 3 C. P. 252; but, if the rule of Court does not perfectly express the intention of the parties at the time the submission was made, it may be amended: *Grimstone* v. *Bell*, 4 Taun. 254; *Evans* v. *Senor*, 5 Taun. 662; *Thompsett* v. *Bowyer*, 30 L. J., C. P. 1.

If all matters in difference *in the cause* are agreed to be referred, and the associate, by mistake, draws up the order of reference generally, as to all matters of difference *between the parties*, it cannot be amended; but the parties must go down to another trial: *Rawtree* v. *King*, 5 Moo. 167.

Setting aside the order for reference.

As to setting aside the order for reference (as distinguished from the *award*), which will sometimes be done instead of amending it, where it has been

erroneously drawn up, or obtained by fraud, see *Rawtree* v. *King*, 5 Moo. 167; *Filmer* v. *Delber*, 3 Taun. 486. Submissions to Arbitration.

Construction of Submission.]—As to the extent of a submission, the distinction between a reference of "all differences in the cause between the parties, and of all differences between the parties in the cause," has been already noticed: *ante*, p. 98. A reference of all *actions* does not include causes of action, but only actions pending, whether personal or mixed: Co. Litt. 285; Roll. Abr. *Arbitr.* (D. 7). A reference of *all demands* includes every thing in dispute, real or personal, and claims in *autre droit*: *White* v. *Halford*, Styles, 170; *Cable* v. *Rogers*, 3 Bulst. 311; Keil. 99; Vin. Abr. *Arbitr.* (D.); *Lumley* v. *Hutton*, Cro. Jac. 447; *Morse* v. *Sury*, 8 Mod. 212. A reference of all *debts and demands* includes debts on record and executions: *Roberts* v. *Mariett*, 2 Saund. 183, 190. A reference of all matters in difference does not include a cause of action accrued, but not in difference at the time: *Ravee* v. *Farmer*, 4 T. R. 146; *Seddon* v. *Tutop*, 6 T. R. 607; *Thorpe* v. *Cooper*, 2 Moo. & P. 245. But it is otherwise of a reference of all actions and causes of action: *Smith* v. *Johnson*, 15 East, 213; *Dunn* v. *Murray*, 9 B. & C. 780. What included in submission.

A reference of all actions between A. and B. does not include actions in which any third person, even the wife of A. or B., is a party: Roll. Abr. *Arbitr.* (D. 4.); *Fisher* v. *Pimbley*, 11 East, 188. But a reference of matters between A. and B. on the one side, and C. of the other, includes matters between any two of them: *Baspole's case*, 8 Rep. 97; *Athelstone* v. *Moone*, Com. 547; *Carter* v. *Carter*, 1 Vern. 259; *Winter* v. *White*, 3 Moo. 674; 1 Br. & B. 350.

Joint and several Submissions.]—Where parties agree jointly and severally to refer disputes to arbitration, and bind themselves jointly and severally to perform the award, if each of two or more parties on one side be ordered to pay any sum of money, or to do any particular act, each is answerable, not only for the performance of what is particularly awarded that he shall perform himself, but also for the Effect of joint and several submission.

Submissions to Arbitration.

obedience of the others on the same side to the award: *Mansell* v. *Burredge*, 7 T. R. 352. See also *Johnson* v. *Wilson*, Willes, 254; *Duke of Northumberland* v. *Errington*, 5 T. R. 522.

The party who pays may recover from his companions their quota.

But the parties on the same side are not without their remedy, in case either of them should suffer by the default of his companion. Thus where arbitrators directed that each of two parties on the same side should pay a moiety of the costs of the arbitration, and of making the submission a rule of Court; and one party, in order to get the award out of the hands of the arbitrators, paid the whole; it was held, that he might have an attachment against the other to compel repayment of the moiety: *Hicks* v. *Richardson*, 1 Bos. & P. 93. And see *Stokes* v. *Lewis*, 2 Smith, 12.

Where six partners entered into two bonds of submission to arbitration; in one of the bonds, three gave a joint and several bond to the other three, conditioned for the due performance of the award; and the latter gave a similar bond to the three former; the arbitrator awarded that one of the three former should pay a certain sum to one of his co-obligors. In an action of debt on the award, brought by the one against the other alone, it was held, that he might recover the sum awarded: *Winter* v. *White*, 3 Moo. 674; 1 Br. & B. 350.

2. Who may refer.

Solicitor in a cause.

Submission by Solicitors, &c.]—The assent of the solicitor in a cause to a reference, by a rule of *Nisi Prius*, will bind the client; for the employing a solicitor in a particular suit, implies the client's assent that he may do every thing which the Court may approve in the progress of the cause: Bac. Abr. *Arbitr.* (C.); Carth. 412; *Buckle* v. *Roach*, 1 Chitt. 193; *Paull* v. *Paull*, 2 Dowl. 340. See *Thomas* v. *Hewes*, 2 Cr. & M. 519. And the same principle equally applies to a reference by the solicitor of an appellant or respondent, at the quarter sessions. See stat. 12 & 13 Vict. c. 45, ss. 12, 13.

After an order of reference has been made, with the consent of counsel and solicitor, the Court will

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not set it aside on an affidavit by a party, stating that he had expressly desired his solicitor not to consent to any rule of reference, though the application be made before any step is taken by the arbitrator, excepting the appointment of a distant day for a meeting, in order to afford time for application to the Court to set the rule aside. The defendant's remedy is by action against his solicitor: *Filmer* v. *Delber*, 3 Taun. 486. See *Mole* v. *Smith*, 1 J. & W. 665; *Furnival* v. *Bogle*, 4 Russ. 142.

Solicitor may extend the time.

So, under an order of reference, a solicitor may extend the time for making an award: *Rex* v. *Hill*, 7 Price, 636, 644. As to the general doctrine respecting the enlargement of the time for making an award, *vide infra*, p. 147 *et seq.*

Where parties are infants.

It was held where an action was brought for the recovery of a sum awarded to the plaintiff, under a reference, that the consent of the attornies in the suit *could not bind such of the parties as were infants*, or their next friends, by whom they were represented, for the performance of the award by the infants: *Biddell* v. *Dowse*, 6 B. & C. 255.

See, as to consent of solicitors and counsel, *Iveson* v. *Conington*, 2 D. & R. 307; 1 B. & C. 160; *Thomas* v. *Hewes*, 2 Cr. & M. 519; *Swinfen* v. *Swinfen*, 2 De G. & J. 381; *Rumsey* v. *King*, 33 L. T., N. S. 728. A fuller examination of the question than is here possible will be found in Russell on Arbitration, pp. 24 *et seq.*

Reference by agent.

The power of an agent to bind his principal by a submission to arbitration will depend upon the nature and terms of his authority. A power of attorney given by a partner to his son, to act on his behalf in dissolving the partnership, with authority to appoint any other person as he might see fit, was held to authorize a reference of accounts to arbitration: *Henley* v. *Soper*, 2 Man. & Ry. 153; 8 B. & C. 16. See, as to the power of a factor, *Curtis* v. *Barclay*, 7 D. & R. 539; 5 B. & C. 141.

Agent when bound personally.

If an agent enter into a submission in his own name, although he describes himself as agent or attorney, he is bound personally, and not his principal: *Cayhill* v. *Fitzgerald*, 1 Wils. 58; *Burrell* v. *Jones*, 3 B. & Al. 47; *Ex parte Hughes*, 5 B. & Al. 482.

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The submission of an infant is voidable, if not void.

Submission by Infant, &c.]—An infant may submit to arbitration, but it is optional with him whether he will abide by the award when he comes of age: *Knight* v. *Stone*, W. Jones, 164; *Stone* v. *Knight*, Latch. 207; *Godfrey* v. *Wade*, 6 Moo. 488; 7 Bac. Abr. *Void and Voidable* (C). However, it was held in several old cases that the submission of an infant is void, and not merely voidable: *Rudston* v. *Yates*, March. 111, 141; *Gill* v. *Russell*, Freem. 139; *Bowyer* v. *Blorksidge*, 3 Lev. 17. It has been said that equity will not decree the performance of an award which shall bind an infant: *Cavendish* v. ———, 1 Ch. Cas. 279; 1 Eq. Ab. 49. But see *Bishop of Bath and Wells* v. *Hippesley*, cit. 3 Atk. 614.

But a guardian or any other person may bind himself that an infant shall perform an award.

A father or guardian may submit for an infant and bind himself that the infant shall perform the award: *Roberts* v. *Newbold*, Comb. 318; *Gill* v. *Russell*, Freem. 62, 139. In the case of *Bristow* v. *Binns*, 3 D. & R. 184, a reference of disputes concerning property of which an infant was tenant for life, was made by the infant's trustees and testamentary guardians. An award made against the trustees, after the death of the infant, was set aside as to them, the death being apparently regarded by the Court as equivalent to a revocation of the submission.

Married woman.

Submission by Married Woman.]—A married woman has been generally regarded as incapable of referring to arbitration any question concerning rights as to which she is *covert*; Roll. Abr. *Arbitr.* (D.), 43; nor can the Court refer it for inquiry whether such a reference would be for her benefit: *Davis* v. *Page*, 9 Ves. 350. See *Emery* v. *Wase*, 5 Ves. 846. But, of course, she may refer a question relating to her separate estate.

Direction in will as to arbitration.

Submission by Will.]—It has been held that no man could appoint by his will, that, if any difference should arise on the construction of it, it should be determined by J. S., and that his determination should be final: *Philips* v. *Bury*, Skin. 454, 471, cited 2 Kyd on Corporations, 206.

An executor or administrator may, as

Submission by Executor.]—An executor or administrator may, as such, submit a matter in dispute

between another and himself in right of his testator. Therefore, when the executor of a parson submitted to arbitration a dispute between the present incumbent and himself, as executor, on account of dilapidations, no objection was made to the want of power in the executor to submit: *Browne* v. *Meverell*, Dyer, 216 b. It was formerly considered that if the arbitrator did not award as much as the executor or administrator would be entitled to at law, it would be a *devastavit* for the residue: Com. Dig. *Administration* (I. 1), *Assets* (C.) *ad finem;* See also *Yard* v. *Eland*, 1 Ld. Raym. 369. But by the Conveyancing and Law of Real Property Act, 1881, sect. 37 (2), "An executor, or two or more trustees acting together, or a sole acting trustee, where, by the instrument, if any, creating the trust a sole trustee is authorized to execute the trusts and powers thereof, may, if and as he or they may think fit," even submit to arbitration any matter relating to the testator's estate or the trust, "without being responsible for any loss occasioned by any act or thing done by him or them in good faith" (*p*).

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such, submit to arbitration.

A submission to arbitration by an executor or administrator has been sometimes regarded as in itself an admission of assets, so as to bar him from afterwards pleading that he had no assets; for the party, by such a submission, enters into a personal engagement to pay whatever the arbitrator shall direct, without any regard to the question of assets: *Barry* v. *Rush*, 1 T. R. 691. See also *Riddell* v. *Sutton*, 2 Moo. & P. 345; and *Pearson* v. *Henry*, 5 T. R. 6.

A submission by an executor or administrator, when an admission of assets.

But it has been held, that the mere act of submission, as executor or administrator, is not, of itself, an admission of assets. See *Love* v. *Honeybourne*, 4 D. & R. 814. And that, if an executor or administrator, as such, submit to arbitration, and the arbitrator simply declare a debt due from the testator or intestate, specifying the amount, without saying by whom it is to be paid, the executor or administrator is not precluded from the

(*p*) This clause virtually re-enacts the repealed sect. 30 of the stat. 23 & 24 Vict. c. 145. It is doubtful whether an administrator, who might merely be a creditor, could refer matters to arbitration under this section. See *Re Clay and Tetley*, 16 Ch. D. 3.

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plea of "fully administered:" *Pearson* v. *Henry*, 5 T. R. 6. However, it may not be quite safe to regard the above case of *Pearson* v. *Henry* as establishing a general principle: for where, under a reference between the plaintiff and the defendant, an administratrix, the arbitrator had ascertained the amount of the plaintiff's demand, and directed the defendant to pay it; and, on showing cause against a rule for an attachment for non-performance of the award, it was urged that the administratrix had no assets, and that the submission to an award by an administratrix was not an admission of assets, as was said in *Pearson* v. *Henry:* Lord *Kenyon*, C. J., said—"The decision in *Pearson* v. *Henry* must be taken with reference to the facts of that case. There the arbitrator only ascertained the amount of the demand, without ordering the administrator to pay it: but here the arbitrator has awarded that the defendant, the administratrix, shall pay the plaintiff's demand. The submission to arbitration by the administratrix was a reference not only of the cause of action, but also of the other question, whether or not the administratrix had assets. And as the arbitrator has awarded the defendant to pay the amount of the plaintiff's demand, it is equivalent to determining as between these parties that the administratrix had assets to pay this debt. The defendant, therefore, is concluded by this award, though it will not operate as an admission of assets in any other action to be brought by any other creditor:" *Worthington* v. *Barlow*, 7 T. R. 453. See *Re Joseph & Webster*, 1 Russ. & M. 496. Therefore, wherever it is doubtful whether the executor or administrator will have sufficient assets to answer the sum likely to be awarded, it should be expressly declared that he shall not be answerable any further than the assets extend.

A demand as executor or administrator is within a general submission; although it be by the husband of an

A demand as executor or administrator is within a general submission to an award: 1 Roll. Abr. 246, pl. 2, 3; 3 Buls. 65. See also *Elletson* v. *Cummins*, 2 Str. 1144. So, if a woman be indebted to J. S. in a certain sum, as administratrix to J. D., and she takes a husband, and the husband and J. S.

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submit all matters between them to the award of W. N., he may make an award of this debt, which is due by the husband and wife, though it be due in the right of his wife, and as administratrix; for he is now chargeable by the intermarriage: *Lumley* v. *Hutton*, Cro. Jac. 447; 1 Roll. Rep. 269. So, upon such a submission, the arbitrator may make an award of a debt due to a woman as executrix: 1 Roll. Abr. 246, pl. 2; 3 Vin. Abr. 51.

executrix or administratrix.

Partners not bound by agreement to refer.

Submission by Partners.]—Where a partnership firm enters into an agreement to refer to a third person, all the partners should execute it; for a submission to arbitration not being a transaction in the ordinary course of business, an individual partner has not the power of binding the firm: *Stead* v. *Salt*, 10 Moo. 389; *S. C.*, 3 Bing. 101. See *Boyd* v. *Emmerson*, 4 Nev. & M. 99; 2 A. & E. 184; *Adams* v. *Bankart*, 1 Cr., M. & R. 681; *Thomas* v. *Atherton*, 10 Ch. D. 185. But in several cases, a deed executed by one partner in the presence and with the privity of the others, has been held to be binding on them: *vide post*, Power of Attorney. And see *Burn* v. *Burn*, 3 Ves. 578. Those partners who execute the submission are of course bound: *Strangford* v. *Green*, 2 Mod. 228.

Submissions by corporations.

Corporations.]—It seems clear that a submission by an incumbent or other corporation sole will not bind his successors. See *Att.-Gen.* v. *Cholmley*, Amb. 510.

Corporations aggregate may enter arbitrations, and if they do so properly, and with the required sanctions (if any), the award will bind them. See Russell on Arbitration, 21. See also *Att.-Gen.* v. *Clements*, 1 Turn. & R. 58. In the case of charities, the consent of the Attorney-General to the reference will generally be required: *Att.-Gen.* v. *Fea*, 4 Madd. 274; *Att.-Gen.* v. *Hewitt*, 9 Ves. 232.

Trustee in Bankruptcy.]—A trustee in bankruptcy may, with the permission of the committee of inspection, refer any dispute respecting the estate to arbitration on such terms as may be agreed on. See sect. 57 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52).

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Committee of Lunatic.]—The committee of a lunatic may, with the leave of the Chancery Division of the High Court, refer to arbitration matters in difference affecting the lunatic's estate: *Dane* v. *Viscountess Kirkwall*, 8 C. & P. 679.

Poor rate appeal may be referred to arbitration.

Poor Rate Appeals.]—An appeal at sessions against a poor rate may, with the consent of the parties interested, be referred by the justices to arbitration: *Rex* v. *Justices of Northampton*, Caldecott, 30. But that can only be for the purposes of information upon facts. The validity of a poor rate could not formerly be determined by arbitration: *Thorp* v. *Cole*, 1 M. & W. 531. But now see stat. 12 & 13 Vict. c. 45, ss. 12, 13 (*p*).

3. Revocation of Submission.

Stat. 3 & 4 Will. 4, c. 42.

When leave of judge requisite to revocation.

When a Submission is revocable.]—Since the stat. 3 & 4 Will. 4, c. 42, s. 39 (stated *ante*, p. 104), the authority of an arbitrator appointed by rule of Court, or order of a judge, or order of *Nisi Prius*, or by submission containing an agreement that the same may be made a rule of Court (*q*), is not revocable *by any party* to such reference without leave of the Court or a judge. See *Bright* v. *Durnell*, 4 Dowl. 756; where it was held, that a reference to two persons who were to choose an umpire before entering upon the reference, was not within the Act, but remained subject to revocation by death or marriage of either party. See also *Bowen* v. *Williams*, 3 Ex. 93; *Leslie* v. *Richardson*, 6 C. B. 378; *Lambert* v. *Hutchinson*, 2 Man. & Gr. 858. As to the nature of the reasons which will induce the Court to permit a revocation of the submission, see *James* v. *Attwood*, 7 Scott, 841. A judge cannot make an order under the Act for the revocation of an arbitrator's authority, on an *ex parte* application: *Clarke* v. *Stocken*, 3

(*p*) As to costs of reference to arbitration of questions relating to rating, see *Leicester Waterworks Co.* v. *Barrow-on-Soar Assessment Committee*, 4 Q. B. D. 18.

(*q*) The arbitrators, if not named in the submission, must be appointed *in writing* before the submission can be made a rule: *Ex parte Glaysher*, 2 H. & C. 442; *Newton* v. *Hetherington*, 19 C. B., N. S. 342; *Re Willcox and Storkey*, L. R., 1 C. P. 671.

Scott, 90. The Court cannot allow a revocation after the award has been made: *Phipps* v. *Ingram*, 3 Dowl. 669. A general agreement to refer to arbitration cannot be revoked by one of the parties: *Piercy* v. *Young*, 14 Ch. D. 200; *Randell* v. *Thompson*, 1 Q. B. D. 748. Where, however, a particular submission does not contain a provision for making it a rule of Court, the old common law right to revoke remains unaffected by sect. 17 of the Common Law Procedure Act, 1854, and either party may revoke the submission accordingly by notice to the arbitrator at any time before the award is made: *Mills* v. *Bayley*, 11 W. R. 598; *Thomson* v. *Anderson*, L. R., 9 Eq. 523; *Re Rouse and Meier*, L. R., 6 C. P. 212: *Randell & Co.* v. *Thompson*, 1 Q. B. D. 748; *Re Fraser & Co. and Ehrensperger*, 12 Q. B. D. 310 (*r*).

Revocation of Submission.

Revocation without leave of judge.

Where after an order of reference in a suit the arbitrators die, or decline to proceed, the suit is not determined, but may be prosecuted as if no reference had been made: *Crawshay* v. *Collins*, 3 Swanst. 90. See *Dalby* v. *Cheslyn*, 2 Y. & C., Ex. 170. The death of either of the parties is a revocation of the arbitrator's authority, and an award afterwards made is therefore void: *Toussaint* v. *Hartop*, 7 Taunt. 571; *Potts* v. *Ward*, 1 Marsh. 366; *Blundell* v. *Brettargh*, 17 Ves. 232; *Cooper* v. *Johnson*, 2 B. & A. 394; *Edmunds* v. *Cox*, 2 Chitt. 432; 3 Doug. 406; *Bristow* v. *Binns*, 3 D. & R. 184; *Rhodes* v. *Haigh*, *ib.* 610 (*s*). But this effect may be prevented by stipulation (*t*).

Effect of death of arbitrator.

Death of parties revokes authority of arbitration.

In the case of *Macdougall* v. *Robertson*, 1 Moo. & P. 156; 2 Y. & J. 11, the deed of reference provided, "That the submission should not vacate or expire through the decease or insolvency of either of the parties, but should notwithstanding such event

What expressions make submission binding on the representatives of a deceased party.

(*r*) It is therefore generally advisable that a submission by agreement or bond should contain a clause providing that the submission shall be made a rule of Court.

(*s*) It appears to be questionable whether the death of one of several parties similarly interested would absolutely revoke the submission as regards the survivors: *Edmunds* v. *Cox*, 2 Chitt. 432; *Re Hare and Milne*, 6 Bing. N. C. 163.

(*t*) The authority of an arbitrator appointed to state a special case has been held not to be revoked by the death of a party: *James* v. *Crane*, 3 D. & L. 661.

Revocation of Submission.

be proceeded in, and the matters in issue determined in the same manner as if such event had not occurred;" and it was held, that the award made after the death of one of the parties was binding. See *Dowse* v. *Coxe*, 10 Moo. 272, where a similar clause received a similar construction. See also *Biddle* v. *Dowse*, 6 B. & C. 255; 9 D. & R. 404; *Smith* v. *Fielder*, 3 Moo. & Sc. 853. And where an order of reference directed that the award was to be delivered to the parties, "*or if either of them should be dead before the making of the award, then to their personal representatives*," it was held, that this amounted to a declaration that the authority of the arbitrators should not be determined by the death of the parties: *Clarke* v. *Crofts*, 4 Bing. 143; *Wrightson* v. *Bywater*, 3 M. & W. 199; *Lewin* v. *Holbrook*, 11 M. & W. 110. But the circumstance of each party covenanting for himself, his *heirs*, &c. to perform the award, does not make it binding on his representatives, if not made in the lifetime of the parties: *Blundell* v. *Brettargh*, 17 Ves. 232. It seems that where an order of reference gives an arbitrator power to make his award after the death of any of the parties, he may, under a general authority to enlarge the time for making his award, enlarge the time after the death: *Tyler* v. *Jones*, 3 B. & C. 144; 4 D. & R. 740. The death of either party is not to operate as a revocation in the case of references under the Lands Clauses Consolidation Act, 1845, the Railways Clauses Consolidation Act, 1845, and the Companies Clauses Consolidation Act, 1845.

Effect of death of parties on power of arbitrator to enlarge time.

Revocation by marriage of *feme*.

The marriage of a *feme* party to a submission before the award is made is a revocation of the arbitrators' authority: *Anon.*, Sir W. Jones, 388; *Saccum* v. *Norton*, 2 Keb. 865; *Charnley* v. *Winstanley*, 5 East, 266; *Andrews* v. *Palmer*, 4 B. & Al. 250, 253. Bankruptcy is not necessarily a revocation of the arbitrator's authority. See *Andrews* v. *Palmer*, 4 B. & Al. 250; *Snook* v. *Hellyer*, 2 Chitt. 43; *Haswell* v. *Thorogood*, 7 B. & C. 705; *Marsh* v. *Wood*, 4 Man. & Ry. 504; 9 B. & C. 659; *Tayler* v. *Shuttleworth*, 8 Scott, 565. In *March* v. *Wood*, the assignees of the bankrupt were held not to be bound by an award made in pursuance of or submission by the bankrupt; but it would be otherwise if they

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were to attend the reference without objecting: *Dod* v. *Herring*, 3 Sim. 143; 1 Russ. & M. 153.

Revocation of Submission.

Where the submission limited no time for making the award, it would formerly have been restrained to a reasonable time; and if in such a case either of the parties requested the arbitrators to make an award within a reasonable time, and after such request they neglected or refused to do it, the party might revoke the authority given to the arbitrators, and it was no breach of the submission: *Newgate* v. *Degelder*, 2 Keb. 10, 20; *Curtis* v. *Potts*, 3 Mau. & S. 147. What was a reasonable time was for the Court to determine: Com. Dig. *Temps* (D). The same doctrine was applicable where the arbitrators had power to enlarge the time for making their award, to an unlimited period; however, in cases coming within the stat. 3 & 4 Will. 4, c. 42, s. 39, the only course where the arbitrator is guilty of unreasonable delay, is to apply to the Court. But now, under the provisions of the Common Law Procedure Act, 1854, s. 15, the limit for making the award is fixed at three months. See *post*, p. 145.

Where the submission limits no time, the award must be made within three months.

In cases where there is no stipulation that the submission shall be made a rule of Court, the act of revocation is a breach of the bond or agreement of submission, and may be the subject of an action: *Vynior's case*, 8 Rep. 83 a; *Warburton* v. *Storr*, 6 D. & R. 213; 4 B. & C. 103; *Brown* v. *Tanner*, M'Clel. & Y. 464. And see *Marsh* v. *Bulteel*, 5 B. & Al. 507; *Grazebrook* v. *Davis*, 8 D. & R. 295; 5 B. & C. 534. And upon the same principle, the marriage of a *feme sole*, which also operates as a revocation, is a breach of such a bond or covenant: *Charnley* v. *Winstanley*, 5 East, 266. Where the submission has been made a rule of Court, the revocation of the arbitrator's authority is a contempt of Court. See *Harcourt* v. *Ramsbottom*, 1 Jac. & W. 511; *Haggett* v. *Welsh*, 1 Sim. 134. And where there was no agreement to make the submission a rule of Court, if either party revoked it without reasonable grounds for doing so, the Court has refused to restrain the other party from acting on the award: *Pope* v. *Lord Duncannon*, 9 Sim. 177. See *Smith* v. *Fielder*, 3 Moo. & Sc. 853.

Revocation is a breach of contract.

Appointment of Umpire.

4. Appointment of Umpire.

Distinction between umpire and third arbitrator.

There is a distinction between an umpire and a *third arbitrator* to be appointed by the arbitrators originally named. The former need not, unless it is required by the terms of the submission, be appointed before the arbitrators enter upon the reference; the latter is an essential part of the tribunal, and must be appointed before any other act (even enlargement of the time for making the award) is done: *Reade* v. *Dutton*, 2 M. & W. 69. See *In re Hick*, 8 Taun. 694; *Lawrence* v. *Hodgson*, 1 Y. & J. 16; *Cudliff* v. *Walters*, 2 M. & Rob. 232.

At what time arbitrators may appoint an umpire.

Arbitrators may, within time limited for making their award, choose an umpire, to make an umpirage after the time for their award is determined: *Jennings* v. *Vandeputt*, Cro. Car. 263; *Watson* v. *Clement*, 1 Roll. Abr. 262, pl. 5; Wms. n. 2 Saund. 133 (7). In the case of *Fyall* v. *Varier*, 1 Roll. Abr. 261, pl. 3, it was held, that if there be a submission to arbitrators, with this clause, "that if they do not end it within ten days, they shall nominate another that shall end it within ten days," and they do not agree within ten days, upon which they appoint another, who makes an award within ten days, the umpirage is good; and by making the umpire, the authority of the arbitrator determines. And the rule was laid down by Lord *Ellenborough*, C. J., in the case of *Harding* v. *Watts*, 15 East, 556:—"It is very convenient for arbitrators to begin by appointing an umpire, because they are more likely to agree upon a proper choice of one before they themselves begin to quarrel; but if the parties have not expressly restrained them from making the choice after the time for making their own award expires, there is nothing to restrain them in reason and sense from choosing the umpire at any time while he has power to act. Such a choice is collateral to the power which they themselves have of awarding between the parties. They may choose the umpire either before or after the time for making their own award expires, provided it be within the time given to the umpire." That the arbitrators may appoint an umpire in the first instance, see also *Bates* v. *Cooke*, 9 B. & C. 407.

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If arbitrators chose an umpire before the time allowed for their award was expired, it was formerly holden, that such nomination was *ipso facto* void, though they absolutely resolved not to make any award themselves: *Reynolds* v. *Gray*, 1 Salk. 70; 12 Mod. 120; 1 Ld. Raym. 222. But it is now well settled that the arbitrators, when they are not restrained by the terms of their authority, may appoint an umpire at any time before the time appointed for the award to be made by such umpire, and that their doing so does not affect their power of making an award, independently of the umpire. If they do not disagree at all, the umpire has no power: if they disagree and refer the matter to the umpire, they may, notwithstanding, make an award at any time within the limits of their authority, unless anticipated by the umpire, who, as soon as his authority commences by the disagreement of the arbitrators, may make his award, whether the time limited to them has expired or not; and the rule is the same whether the umpire was named in the reference or appointed by the referees: *Sprigens* v. *Nash*, 5 Mau. & S. 193; *Smailes* v. *Wright*, 3 Mau. & S. 559; *Cudliff* v. *Walters*, 2 M. & Rob. 232.

In the case of *Beck* v. *Sargent*, 4 Taun. 232, where the submission was, "So that the two arbitrators should make their award before or on the 21st day of June; but if no award should be made before or on that day, then that the parties should observe the award of an umpire to be chosen by the arbitrators, so as such umpirage should be made before the 28th of June," it was held that the time to appoint an umpire commenced when the time for making the award expired. And by sect. 14 of the Common Law Procedure Act, 1854, it is enacted that "When the reference is to two arbitrators, and the terms of the document authorizing it do not show that it is intended that there should not be an umpire, or provide otherwise for the appointment of an umpire, the two arbitrators may appoint an umpire *at any time within the period during which they have power to make an award*, unless they

17 & 18 Vict. c. 125, s. 14.

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be called upon by notice as aforesaid (*r*) to make the appointment sooner."

The arbitrators joining with the umpire in making his award does not invalidate it.

Where arbitrators, having chosen an umpire according to their power, afterwards joined with him in making his award, it was held notwithstanding to be a good one; for in law it is the umpirage of the *umpire only*, who was at liberty to take what advice, or opinion, or assistance he pleased: *Soulsby* v. *Hodgson*, 3 Bur. 1474; 1 W. Bl. 463; *Bates* v. *Cooke*, 9 B. & C. 407. It is no more than if mere strangers had joined in the award, which could not vitiate: *Beck* v. *Sargent*, 4 Taun. 232. And if the arbitrators hear all the evidence, and afterwards disagree, and state the evidence to the umpire, on which he makes his award *without re-examining the witnesses*, it is good, unless he is required to examine them before he makes his award: *Hall* v. *Lawrence*, 4 T. R. 589. So if an arbitrator makes his award without examining the witnesses *on oath*, that is no objection to the validity of the award, unless it be made at the time of their examination: *Ridoat* v. *Pye*, 1 Bos. & P. 91.

Umpire may decide on the arbitrators' report of evidence to him.

Whether, if umpire refuses, the arbitrators may elect another, *toties quoties*.

It was formerly doubted whether arbitrators, having named an umpire, who refuses to act, can afterwards appoint another. See *Reynolds* v. *Gray*, 1 Salk. 70; 1 Ld. Raym. 222; 12 Mod. 120. But it may now be regarded as settled that their power is not so determined by the election of the first umpire, that upon his refusal they cannot appoint another: the first nomination being void by his refusal, is the same thing as if they had never chosen an umpire at all: *Trippet* v. *Eyres*, 3 Lev. 263; 5 Mod. 457; 2 Vent. 113. If the umpire elected refuses, the arbitrators may elect another, *toties quoties:* Com. Dig. *Arbitrament* (F); Wms. n. 2 Saund. 133 *a*. But if the umpire once accept the office, his subsequent refusal will not remit the arbitrators to their power: *Oliver* v. *Collings*, 11 East, 369.

In the case of *Harding* v. *Watts*, 15 East, 556, it was objected to the authority of an umpire, that the arbitrators before appointing him, had refused to

(*r*) *I. e.*, notice in writing.

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appoint any umpire, and thereby had renounced their authority, and were *functi officio;* but *Bayley*, J., observed that the refusal was confined to a period on or before the 1st of March, and their power extended to the 25th, before which it was executed. It seems, too, that a power of appointing an umpire, being a power simply collateral, cannot be destroyed in any other way than by exercising it.

Mode of choosing an umpire.

An improper mode of choosing an umpire sometimes forms a ground for setting aside the award. Thus if two arbitrators toss up which of them shall nominate the third, this will vitiate the appointment: *Harris* v. *Mitchell*, 2 Vern. 485; *Hewitt* v. *Penny*, Sayer, 99; *Wells* v. *Cooke*, 2 B. & Al. 218; *Young* v. *Miller*, 5 D. & R. 263; 3 B. & C. 407. But where the parties named two arbitrators, who were to choose a third, and the award was to be made by the three, or any two of them, and each of the arbitrators proposed to the other a third, *who was admitted by the other to be a fit person;* but not being able to agree which of the two proposed should be selected, they agreed to decide the choice by lot; it was held that this was within their authority, and that an award made by such third arbitrator, in conjunction with the one by whom he had been originally proposed, could not be impeached on that account: *Neale* v. *Ledger*, 16 East, 51. In this case it will be perceived, as each arbitrator admitted the fitness of the person proposed by the other, such person might be considered as the nominee of *both.* The decision in *Neale* v. *Ledger* was disapproved of in *In re Cassell*, 4 Man. & Ry. 555; 9 B. & C. 624. See also *Ford* v. *Jones*, 3 B. & Ad. 248; but has been since repeatedly held to be good law: *Morgan* v. *Bolt*, 1 N. R. 271; *Re Hopper*, L. R., 2 Q. B. 367.

It is settled, however, that an umpire may be well chosen by lot, if all the parties to the reference assent to such a proceeding, the assent amounting in effect to a new submission. This was decided in *In re Tunno & Bird*, 2 Nev. & M. 328; 5 B. & Ad. 488, where the evidence of assent was conclusive. Attending an umpire who has been improperly appointed, does not bind the parties unless they are fully aware of the mode in which he has been ap-

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pointed: *Wells* v. *Cooke*, 2 B. & Al. 218; *In re Greenwood*, 1 Per. & D. 461; 9 A. & E. 699. Thus, if either party (or his attorney) knows that the umpire had been chosen by lot, but does not know that one of the arbitrators objected to him, he is not bound by acquiescence: *Re Jamieson*, 4 A. & E. 945. The attorney or agent of either party has authority to assent to appointing an umpire by lot: *Backhouse* v. *Taylor*, 20 L. J., N. S., Q. B. 233. The assent of the attorney's clerk is insufficient: *In re Hodson*, 7 Dowl. 569.

The *whole* case must be referred to an umpire.

It seems, that where arbitrators have a special power to choose an umpire, they must refer the *whole* matter to him, and the submission of a particular point only is bad: *Tollit* v. *Saunders*, 9 Price, 612; *Middleton* v. *Wikes*, 1 Roll. Abr. 256, pl. 27; *Bradford* v. *Brien*, Willes, 268; 7 Mod. 349; *Hetherington* v. *Robinson*, 7 Dowl. 192.

5. The Proceedings down to the making of the Award.

Arbitrators must act impartially.

Duties of Arbitrators.]—When arbitrators are named, one by each party, they ought not to consider themselves as solely representing the persons by whom they were respectively nominated, and as the advocates of their cause, but as called upon to execute a joint trust; and they are bound to look with impartiality to the interests of each party: *Calcraft* v. *Roebuck*, 1 Ves. jun. 226; *Fetherstone* v. *Cooper*, 9 Ves. 68.

Two arbitrators may make an award, if the third, after notice, absents himself.

When a cause is referred to three persons, and they, or any two of them, are empowered to make an award, although one of the three never attended any of the meetings of the referees, an award made by two of them is good, provided the third had due notice of the several meetings appointed, and of the several matters referred: *Dalling* v. *Matchett*, Willes, 215; *Goodman* v. *Sayers*, 2 Jac. & W. 261. See also *Moseley* v. *Simpson*, L. R., 16 Eq. 226. But if a submission be to three, or any two of them, and two by fraud or force exclude the other, that alone is sufficient to vitiate the award: *Burton* v. *Knight*, 2 Vern. 514.

Where a cause was referred to two arbitrators, with power to appoint an umpire, and the parties

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agreed to abide by the award "of the two arbitrators *and* their said umpire," the Court considered the validity of an award made by the arbitrators alone to be too doubtful to grant an attachment on: *Hetherington* v. *Robinson*, 4 M. & W. 608. See *Winteringham* v. *Robertson*, 27 L. J., N. S., Ex. 301.

Arbitrators must call the parties before them.

Evidence.]—After an action brought for not repairing a house, &c., the matters in difference had been referred to arbitrators, who made their award upon a view of the premises, without calling the parties before them. The Court set aside the award, for though the premises might almost tell their own tale, yet there might be other facts which should be inquired into, such as payments by the party, or excuses for not repairing, &c.: *Anon.*, 2 Chitt. 44. So, *à fortiori*, an award will be set aside if the arbitrator hears the evidence on one side only: *Braddick* v. *Thompson*, 8 East, 344; *Phipps* v. *Ingram*, 3 Dowl. 669.

Notice of meeting must be given.

Want of notice of the meeting of the arbitrators is a ground for setting aside an award: *Anon.*, 1 Salk. 71.

Effect of taking evidence in absence of party.

Where arbitrators, having partly proceeded in the reference, declared they could take no further proceedings till some books of account had been looked into, but afterwards examined a witness, in the absence of the defendant, when they determined that it was unnecessary to inspect the books, and signed a minute of their award, the Court held, that the defendant should have had notice that it was found unnecessary for the arbitrators to inspect the books, and accordingly the award was set aside: *Pepper* v. *Gorham*, 4 Moo. 148. The circumstance, that the witness was examined in the absence of the party, was of itself a sufficient ground for setting aside the award; *Bedington* v. *Southall*, 4 Price, 235; and so an award may be set aside if the arbitrator receive evidence after notice to the parties, that he would receive no more, and acquiescence by them: *Walker* v. *Frobisher*, 6 Ves. 70; *Fetherstone* v. *Cooper*, 9 Ves. 67.

But if the parties neglect to attend in person, or by their solicitor, the arbitrator's appointment having been regularly notified to them, he may proceed *ex*

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parte: *Waller* v. *King*, 9 Mod. 63; *Harcourt* v. *Ramsbottom*, 1 Jac. & W. 512; *Hobbs* v. *Ferrars*, 8 Dowl. 779. Whether he will proceed *ex parte*, or not, is in the discretion of the arbitrator: *Wood* v. *Leake*, 12 Ves. 412. Nor is it any ground to set aside an award, that the solicitor cannot attend at the time the arbitrators appoint; he must attend, if they make a reasonable appointment: *Fetherstone* v. *Cooper*, 9 Ves. 68.

But in one case an award was set aside on the ground that one of the parties had been examined in the absence of the other, though the absent party had notice of the meeting: *Re Hick*, 8 Taun. 694. See, as to this, *Bignall* v. *Gale*, 9 Dowl. 631; *Dodington* v. *Hudson*, 1 Bing. 384.

If a party to a reference within the statute 3 & 4 Will. 4, c. 42, has attempted to revoke the arbitrator's authority, he must still have notice of these meetings: *In re Kyle*, 2 Jur. 760.

In the case of a reference by order of Nisi Prius or by rule of Court, according to the statute, a party may apply for a rule to show cause why his opponent should not attend before the arbitrators, or why the latter should not be directed to make their award, without waiting for such attendance: *Hetley* v. *Hetley*, cited Kyd on Awards, 100.

Notice of intention to employ counsel.

If either party intends to employ counsel before the arbitrators, he should give notice of his intention to his opponent, so that he may have an opportunity of placing himself in an equally advantageous position. Thus, where the plaintiff in a cause which was referred attended before the arbitrator by counsel, without giving notice of his intention to the defendant, and the defendant requested an adjournment to give him time to instruct counsel, but the arbitrator proceeded *ex parte*, and certified in the plaintiff's favour, the Court, on motion, stayed the certificate, and referred the cause back to the arbitrator: *Whatley* v. *Morland*, 2 Cr. & M. 347; 2 Dowl. 249.

Swearing the witnesses, &c.

Where a cause was referred at the trial, it was usual to get the witnesses sworn before they left the Court, and under that oath they went to the arbitrator; but now it is more usual for the arbitrator

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to administer the oath himself, which he has authority to do: *ante*, p. 105.

The Court or a judge has concurrent jurisdiction with the arbitrator to swear witnesses; *James* v. *Attwood*, 7 Scott, 841; and on the other hand an order of reference, directing the witnesses to be examined before a judge or commissioner, does not exclude the arbitrator's power to examine them: *Hodsoll* v. *Wyse*, 4 M. & W. 536.

The order of Nisi Prius being obtained from the associate in London or Middlesex, or at the assizes, a copy should be served on the arbitrator, which will be his authority to proceed; the arbitrator will then make an appointment in writing of a time and place for the parties and their witnesses to attend him, which appointment should be subscribed to a copy of the order of Nisi Prius and served therewith on the defendant's solicitor. Previously to the meeting, it may be convenient that the arbitrator should be furnished with a statement of the case, and the names of the witnesses, &c. A similar mode of proceeding is to be observed where the reference is by agreement without suit: 2 Tidd, 9th ed. 825.

Examination of parties interested.

Where the arbitrator has authority to examine the parties, he may examine a party in support of his own case, *Warne* v. *Bryant*, 3 B. & C. 590; or any other interested witness: *Lloyd* v. *Archbowle*, 2 Taun. 324. But this is entirely in his own discretion: *Scales* v. *East London Waterworks Co.*, 2 Hodg. 91; *Morgan* v. *Williams*, 2 Dowl. 123; *Matson* v. *Trower*, 1 Ry. & M. 18.

It is no objection to an award that the arbitrators have, in the absence of one of the parties, called in the other, and asked him merely whether he admitted or disputed certain items in an account: *Anderson* v. *Wallace*, 3 Cl. & F. 26.

Enforcing attendance of witnesses and production of papers.

The attendance of a witness could not formerly be enforced in any case; *Wansell* v. *Southwood*, 4 Man. & Ry. 359; but now under the statute 3 & 4 Will. 4, c. 42, s. 40 (*ante*, p. 105), the Court, or any judge, may compel the attendance of witnesses and the production of documents, on the application of arbitrators, named in any reference within the Act. The order for this purpose is obtained either upon

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motion in Court, or from a judge at chambers, upon a memorandum, signed by the solicitor of the party who requires the evidence, stating that the attendance of the witness, or production of the documents, is material, and having annexed to it a copy of the order or agreement of submission, and of any subsequent appointment of any arbitrator or umpire. The order must state the day or days of attendance.

Discretion of arbitrators as to mode of taking evidence.

If the submission is conditioned, "so that the witnesses be examined on oath," and affidavits are admitted by the arbitrator, the award may be set aside; *Banks* v. *Banks*, 1 Gale, 46; but if the award is not so conditioned, the arbitrator may take the evidence in any way he pleases, or not at all; provided the parties have due notice of his proceedings, and do not object. Thus the arbitrators may make their award, without examining the witnesses on oath, unless required to do so at the time: *Ridoat* v. *Pye*, 1 Bos. & P. 91. And so an umpire may decide upon the arbitrator's report of the evidence, unless he is required to examine them; *Hall* v. *Lawrence*, 4 T. R. 589; and a party who knows that the matter has gone before the umpire, and does not then interfere, cannot afterwards object to the umpire's not having gone into the evidence afresh: *Re Tunno and Bird*, 2 Nev. & M. 328; 5 B. & Ad. 488; *Re Salkeld*, 4 Jur. 1131. See *ante*, p. 136.

The witnesses should be examined in the presence of the party if he require it.

All the witnesses of the party against whom an award is made should be regularly examined, and in the presence of him or of his solicitor, if he require it, or it will be a ground for setting aside the award; *Walker* v. *Frobisher*, 6 Ves. 70 (*s*); but the fact must be clearly proved by affidavits: however, a formal requisition, that a witness shall be examined, is not requisite; merely naming and producing him to the arbitrator is sufficient: *Beddington* v. *Southall*, 4 Price, 235. An irregular reception of evidence will gene-

As to exclusion of *both* parties.

(*s*) In *Hewlett* v. *Laycock*, 2 Car. & P. 576, *Abbott*, C. J., was of opinion that the exclusion of *both* the parties and their attornies during the examination of a witness, and the taking such examination at the witness's own house, was no ground for setting aside an award. See *Matson* v. *Trower*, 1 Ry. & M. 17. But it is very doubtful whether that decision would be followed at the present time. See *Haigh* v. *Haigh*, 3 De G., F. & J. 157.

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rally be fatal, although the arbitrator should swear that it did not influence his mind in making the award: *Walker* v. *Frobisher*, 6 Ves. 70; *Fetherstone* v. *Cooper*, 9 Ves. 69; *Harcourt* v. *Ramsbottom*, 1 Jac. & W. 512. This rule, indeed, has not been invariably adhered to, for in *Atkinson* v. *Abraham*, 1 Bos. & P. 175, *Eyre*, C. J., refused to set aside an award on the ground that the arbitrator had re-examined a witness after the evidence had been closed and the attorney of one of the parties had gone, although such witness gave testimony different from that which he had formerly given, and by which the arbitrator confessed his judgment was influenced. See also *Bignall* v. *Gale*, 2 Man. & Gr. 830; *Crossley* v. *Clay*, 5 C. B. 581. But in two more recent cases the Court of Queen's Bench refused to follow these decisions, and adopted the rule laid down by Lord Eldon in *Walker* v. *Frobisher*, *supra*. See *Dobson* v. *Groves*, 6 Q. B. 637; *Plews* v. *Middleton*, 6 Q. B. 845.

Whether arbitrator may swear his judgment was not influenced by irregular proceeding.

It seems that conduct which would be irregular, if its result had any influence on the determination of the arbitrator, may not be a ground of objection to the award, if the arbitrator will swear that he was not influenced by it. The effect, indeed, of a contrary rule would be, to make any false step on the part of the arbitrators, or any of them, irretrievably fatal to the reference. Thus, the Court refused to set aside an award made by two of three arbitrators, upon a suggestion by the third that the award had been influenced by the opinion of counsel taken by the others, upon a case inaccurately stated; the two arbitrators denying the alleged inaccuracy, and swearing that their minds were made up as to the award before the opinion was taken: *Re Hare*, 8 Scott, 367. But arbitrators may take the opinion of any person to whom they may choose to refer the whole or any part of the matters referred to them, to assist their judgment, provided they do not previously agree to be bound by it, for when adopted by them, it becomes their opinion: *Anderson* v. *Wallace*, 3 Cl. & F. 26. See *Emery* v. *Wase*, 5 Ves. 846; *Hopcraft* v. *Hickman*, 2 Sim. & St. 130.

Error in rule of reference.

If, upon a reference by rule of Court, either party is precluded by the terms of the rule from going

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into evidence of that which he is desirous to try, his remedy is by moving to set aside the rule of reference, upon affidavits showing that it was drawn up by mistake, but he cannot impeach the award: *Doe* d. *Carlisle* v. *Bailiff, &c. of Morpeth*, 3 Taun. 378; *Prosser* v. *Goringe*, 3 Taun. 432.

Effect of improper rejection of evidence.

It seems that the improper rejection of evidence is a ground for impeaching an award. See *Morgan* v. *Mather*, 2 Ves. jun. 16; *Anderson* v. *Darcy*, 18 Ves. 449; *Phipps* v. *Ingram*, 3 Dowl. 669. And so would be a clearly admitted mistake as to the facts. But a declaration by *one* of several arbitrators, that, if he had seen a letter which had been found since the award was made, he would have acted differently, was held not to be sufficient for this purpose: *Ib.*

Arbitrator's discretion as to postponing award for further evidence.

It is generally in the discretion of the arbitrator, whether, after the parties have had fair notice of the time of attendance, he will postpone the making of his award, for the purpose of giving time for the production of further evidence: *Spettigue* v. *Carpenter*, 3 P. Wms. 361; *Wood* v. *Leake*, 12 Ves. 412; *Ringer* v. *Joyce*, 1 Marsh. 404; *Re Hall* v. *Anderton*, 8 Dowl. 326. But he must not allow either party to fall into any mistake on the point: *Dodington* v. *Hudson*, 1 Bing. 384; 8 Moo. 163; *Pepper* v. *Gorham*, 4 Moo. 148. See *Grazebrook* v. *Davis*, 8 D. & R. 295; 5 B. & C. 534.

Arbitrators must observe rules of evidence.

In receiving evidence arbitrators must follow the ordinary rules of evidence which govern the superior Courts; and therefore it was held that the examination by referees of witnesses in the absence of the party to be affected by their testimony, who therefore had no opportunity of cross-examining them, was irregular: *Att.-Gen.* v. *Davison*, M'Clel. & Y. 160. But the arbitrator is generally the proper and final judge of the admissibility of particular evidence, where the point is at all doubtful; *Campbell* v. *Twemlow*, 1 Price, 81; *Anderson* v. *Darcy*, 18 Ves. 447; *Symes* v. *Goodfellow*, 4 Dowl. 642; and, at least where a lawyer is appointed arbitrator, he is constituted by the parties judge of the law as well as of the facts: *Perryman* v. *Steggall*, 3 Moo. & Sc. 93. The arbitrator must find according to the evidence before him: *Woof* v. *Hooper*, 6 Scott, 281.

See *Bird* v. *Penrice*, 8 Dowl. 775; *Moore* v. *Butlin*, 2 Nev. & P. 436; *France* v. *White*, 8 Scott, 257. Proceedings before Arbitrators.

6. Time for making the Award.

Limitation of Time for making Award.]—Unless the submission fixes a limit of time within which the award is to be made, it must be made within three months after the arbitrator shall have entered on his reference (*t*). The 15th section of the Common Law Procedure Act, 1854, contains the following provisions on this subject:— Statutory limitation of time for making award.

"The arbitrator acting under any such document (*u*) or compulsory order of reference as aforesaid, or under any order referring the award back, shall make his award under his hand, and (unless such document or order respectively shall contain a different limit of time) within three months after he shall have been appointed, and shall have entered on the reference, or shall have been called upon to act by a notice in writing from any party, but the parties may by consent in writing enlarge the term for making the award; and it shall be lawful for the superior Court of which such submission, document, or order is or may be made a rule or order, or for any judge thereof, for good cause to be stated in the rule or order for enlargement, from time to time to enlarge the term for making the award; and if no period be stated for the enlargement in such consent or order for enlargement, it shall be deemed to be an enlargement for one month; and in any case where an umpire shall have been appointed it shall be lawful for him to enter on the reference in lieu of the arbitrators, if the latter shall have allowed their time or their extended time to expire without making an award, or shall have delivered to any party or to the umpire a notice in writing stating that they cannot agree."

When the submission requires the award to be made and ready to be delivered on a certain day (*v*), if the award be actually made on the day limited, it When the award is made, it is "ready to be delivered."

(*t*) Entry on the reference does not mean merely acceptance of the office by the arbitrator, or giving notice of intention to proceed, but it means commencement of the inquiry with the parties before him, or *ex parte*: *Baker* v. *Stephens*, L. R., 2 Q. B. 523.

(*u*) That is to say, "document authorising the reference." See sect. 14.

(*v*) The day on which the reference commences is excluded from the computation: *Higham* v. *Jessop*, 9 Dowl. 203.

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is then ready to be delivered: *Bradsey* v. *Clyston*, Cro. Car. 541; *Robison* v. *Calwood*, 6 Mod. 82; *Brown* v. *Vawser*, 4 East, 584; *Mussellbrook* v. *Dunkin*, 2 Moo. & Sc. 740; *Jones* v. *Corry*, 7 Scott, 106; *Brooke* v. *Mitchell*, 6 M. & W. 473. As to the limitation of time for making awards under the Lands Clauses Act, 1845, see *ante*, p. 112. Under the Railways Companies Arbitration Act, 1859 (22 & 23 Vict. c. 59), if the arbitrators do not agree on their award, the matter is to stand referred to their umpire (sect. 17); and the umpire has power (except where the companies otherwise agree), from time to time, to extend the period for making his award (sect. 23). So where, by the terms of reference, attestation and delivery are not requisite to perfect an award, if it be once complete by the signature of an umpire or arbitrator, it is then ready for delivery, though not attested or delivered: *Henfree* v. *Bromley*, 6 East, 310. But the signing of the minutes of the award is not a making of the award (*x*): *Blundell* v. *Brettargh*, 17 Ves. 232. A parol award may be "ready for delivery:" *Oates* v. *Bromil*, 1 Salk. 75. If either of the parties do, on the last day, request the arbitrators to deliver the award to him, and they neglect or refuse to do so, the bond is forfeited: *Rowsby* v. *Manning*, 3 Mod. 331, recognised in *Marks* v. *Marryot*, Lutw. 158; *Oates* v. *Bromhill*, 6 Mod. 176. So, in *Wilson* v. *Wilson*, cit. 1 Wms. Saund. 327 c, where, in an action on a bond for non-performance of an award, it appeared in evidence that the arbitrators had made their award on the day limited, but, because it was not stamped, refused to deliver it to the defendant, according to his request; *Eyre*, C. J., held that the arbitrators had not complied with the condition of the bond, and directed a verdict for the defendant.

Delivery to parties, when requisite.

If the submission requires the award to be delivered or notified to the parties, and not merely to be ready for delivery, it must of course be

(*x*) If signing or sealing is required, an unsigned or unsealed award is of course void: *Everard* v. *Paterson*, 2 Marsh. 304. See 2 Wms. Saund. 62.

delivered or notified accordingly; *Child* v. *Horden*, 2 Bulstr. 144; and a proviso that the award shall be delivered to *either* of the parties means *each* of them: *Hungate's case*, 5 Rep. 103 a; Cro. Eliz. 885; *Block* v. *Palgrave*, Cro. Eliz. 797. But it is otherwise if the award is to be delivered to the parties, *or* either of them: *Cocks* v. *Macclefield*, 2 Dyer, 218 b. An award will be presumed to have been made at the time mentioned in the attestation: *Doe* d. *Clarke* v. *Stillwell*, 8 A. & E. 645. Time for making Award.

When the order of reference required the arbitrator to make *and publish* his award in writing, ready to be delivered to the parties, or such of them as should require the same, by a certain day, it was held that an award executed by the arbitrator, and attested, was published: *Brooke* v. *Mitchell*, 6 M. & W. 473. See also as to publication of an award, *Henfree* v. *Bromley*, 6 East, 309; *Little* v. *Newton*, 2 Man. & Gr. 351; *Moore* v. *Darley*, 1 C. B. 445; and *infra*, p. 189. What is a publication of an award.

The submission should provide that if the arbitrator cannot make his award within the time named, he may, either with the consent of the Court or a judge or of his own authority, extend the time. Of course the enlargement must be made strictly in the manner prescribed by the submission. When no such power is given by the submission, a rule or order for enlarging the time may be obtained in cases falling within the stat. 3 & 4 Will. 4, c. 42, s. 39, *ante*, p. 104, by motion in Court or by a summons before a judge. The Lands Clauses Consolidation Act, s. 31, *ante*, p. 112, confers on the arbitrators a limited power of enlargement of time; cf. sect. 23. But in cases not provided for by the terms of the submission or by statute, a rule for enlargement made without the consent of the parties is invalid: *Halden* v. *Glascock*, 5 B. & C. 390. Notice of the enlargement of time must be given to the party, if it is intended to move for an attachment for disobedience to the award; *Davis* v. *Vass*, 15 East, 97; *Wohlenberg* v. *Lageman*, 6 Taun. 251; which notice may be verbally given at the time of serving the award on the party: *Doddington* v. *Bailward*, 7 Dowl. Enlargement of time.

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640; 7 Scott, 733. It is convenient, for the purpose of avoiding the necessity of an affidavit, to state the enlargement of time in the award; but it is not necessary to do so: *George* v. *Lousley*, 8 East, 13; *Sprigens* v. *Nash*, 5 Mau. & S. 193. An order or rule obtained *ex parte* is invalid: *Clarke* v. *Stocken*, 3 Scott, 90.

Court may enlarge time, though arbitrators are empowered to do so.

Where an award was to be made within a month or within such further time (not exceeding three months from the date of the submission) as the arbitrator should enlarge the time to, it was held that though, after the expiration of the three months, the arbitrator had no power to enlarge the time, the Court could enlarge the time under sect. 15 of the Common Law Procedure Act, 1854, notwithstanding the limit fixed by the submission: *Denton* v. *Strong*, L. R., 9 Q. B. 117.

The jurisdiction given to the Court by the stat. 3 & 4 Will. 4, c. 42, to enlarge the time for making the award, is general, and applies to submissions containing a power for the arbitrator to enlarge the time: *Re Salkeld*, 4 Jur. 1132. And whether an arbitrator has allowed the period, within which he had power to enlarge the time, to elapse without his exercising his power, or has enlarged the time in exercise of his power: *Newman* v. *Parbery*, 5 Jur. 175. See also *Potter* v. *Newman*, 2 Cr., M. & R. 742;

Time within which enlargement must be made.

Burley v. *Stephens*, 1 M. & W. 156. Where an arbitrator has power to enlarge the time for making his award, he must do so during the time originally fixed for making the award. In *Reid* v. *Fryatt*, 1 Mau. & S. 1, it was said that an enlargement might be valid if made immediately after expiration of the original time; but that dictum has not been followed in other cases: *Benwell* v. *Hinxman*, 1 Cr., M. & R. 935. The rule now seems to be that an enlargement of time by an arbitrator after the original time has expired is utterly void: Russ. Arbitr. 116.

When a third arbitrator is to be appointed, the two arbitrators originally named cannot enlarge the time before such appointment is made, although power is given to the three, or any two of them: *Reade* v. *Dutton*, 2 M. & W. 69. See *Cudliff* v. *Walters*, 2 M. & Rob. 232.

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When the time is enlarged "until" a particular day, the word "until" is for this purpose inclusive, and the award may be made on that day: *Knox* v. *Simmonds*, 3 Bro. C. C. 358. For the word "until" may be construed as either exclusive or inclusive of the day to which it is applied, according to the context and subject-matter: *Rex* v. *Stevens*, 5 East, 244; *Withers* v. *Drew*, Cro. Eliz. 676; *Anon.*, Latch, 14. See *In re Higham and Jessop*, 9 Dowl. 203. Months, unless otherwise expressed, are construed to mean lunar months: *Re Swinford and Horn*, 6 Mau. & S. 226; *Stephens* v. *Lowe*, 2 Moo. & Sc. 44. "The 28th day of October next," in an instrument dated the 13th of October, means the same month: *Brown* v. *Smith*, 8 Dowl. 867.

"Until" is inclusive.

Sometimes no day is fixed by the reference for making the award, or the arbitrator is empowered to enlarge the time indefinitely; but the award must, in such cases, be made within a reasonable time: *Macdougall* v. *Robertson*, 2 Y. & J. 11; 1 Moo. & P. 147. See *Curtis* v. *Potts*, 3 Mau. & S. 145; *Stephens* v. *Lowe*, 2 Moo. & Sc. 44, 51. Unreasonable delay in making the award would be a ground for applying to the Court to revoke the submission. Where, upon a reference of a cause at the assizes, a verdict is entered for the plaintiff, with power for the arbitrator to certify for whom the verdict is to be entered, he may give his certificate after the assizes are over, although no order of Nisi Prius is obtained: *Tomes* v. *Hawkes*, 2 Per. & D. 248. See *Salter* v. *Yeates*, 5 Dowl. 291; 2 M. & W. 67.

Enlargement after death of a party.

If the arbitrator is empowered to make his award, notwithstanding the death of either party, and is also empowered generally to enlarge the time for making it, he may enlarge the time after the death of a party: *Tyler* v. *Jones*, 4 D. & R. 740; 3 B. & C. 144.

What is a sufficient enlargement of time.

Where no formality is prescribed by the terms of the power for enlarging the time, any indication of intention on the part of the arbitrator is a sufficient exercise of the power. Thus, if he appoint a meeting for a day beyond the original time limited, that is a good enlargement: *Burley* v. *Stephens*, 1 M. &

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W. 156. And where the arbitrator had sufficient authority of himself to enlarge the time, an indorsement in the order of reference in these words—"I direct that a rule of this Court shall be applied for by counsel's hand, to enlarge the time for making my award," was thought to be a sufficient enlargement, notwithstanding no rule was applied for; but, as the parties had waived the objection by attending the arbitrator, it was unnecessary to decide the point: *Hallett* v. *Hallett*, 5 M. & W. 25.

Enlargement of time by umpire.

Where an umpire is appointed, with a limited time for making his award, and power is given to him and to the arbitrators respectively, to enlarge the time for making their several awards, and the arbitrators enlarge the time accordingly, the proper course is for the umpire to keep his authority alive also by successive enlargements of the time, although the arbitrators have not yet disagreed: *Re Dodington and Bailward*, 7 Scott, 733; 7 Dowl. 640.

Power to make "an application" for enlargement of time, means *several applications.*

Where the submission expressed that the arbitrator should be at liberty to make "an application" to the Court, for an enlargement of the time in which he was to make his award, several applications, from time to time, were held to be within the meaning of the terms of the submission. So where a submission expressly gives the arbitrator power to enlarge the time, it authorizes several enlargements, as often as he thinks necessary: *Payne* v. *Deakle*, 1 Taun. 509; *Barrett* v. *Parry*, 4 Taun. 658.

The parties may enlarge the time by consent (*y*): *Benwell* v. *Hinxman*, 1 Cr., M. & R. 935. And the conduct of the parties may amount to consent. So if either party subsequently attend before the arbitrator, or in any other way recognize the validity of his proceedings, he will be bound: *ante*, pp. 121, 137. But attendance will not sanction future irregularities

(*y*) The consent if in writing should be stamped: *Evans* v. *Thompson*, 5 East, 193. See also *Robinson* v. *Macdonnell*, 5 Mau. & S. 234; *Watkins* v. *Phillpotts*, M'Cl. & Y. 393. In cases within sect. 15 of the Common Law Procedure Act, 1854, *ante*, p. 145, the consent to enlargement of time must be in writing.

of the same kind: *Mason* v. *Wallis*, 10 B. & C. 107. If the authority of the arbitrators or umpire has actually determined, it seems that it cannot be revived without a new agreement deed, or bond, properly stamped and executed, and incorporating by reference the terms of the original submission: *Evans* v. *Thompson*, 5 East, 193; *Stephens* v. *Lowe*, 2 Moo. & Sc. 44. See *R.* v. *Hill*, 7 Price, 636, 644, as to an enlargement under an order of reference. But if a party proceeds in the reference with knowledge that the arbitrator's authority is determined, he precludes himself from subsequently objecting to the validity of the award on this ground: *Lawrence* v. *Hodgson*, 1 Y. & J. 16; *In re Hick*, 8 Taun. 694.

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7. The Substance and Validity of the Award.

Certainty of Award.]—The general requisites of an award are, that it should be certain and final (*a*): 1 Roll. Abr. 263; 1 Bac. Abr. Gwill. Ed. 218, *Arbitrament* (E.) 2; *Bowes* v. *Fernie*, 4 My. & Cr. 150. For as an award is in the nature of a judgment, it ought to be wholly decisive; for if it does not determine the matter, it becomes the cause of a new controversy; therefore, if the arbitrators award a bond for quiet enjoyment of lands, without appointing a certain sum, this is a void award, and the party is not obliged to give a bond to the value of the land: *Samon's case*, 5 Rep. 78; *S. C.* nom. *Samon* v. *Pitt*, Cro. Eliz. 432; *Martham* v. *Jemx*, Yelv. 97. See *Mortin* v. *Burge*, 4 A. & E. 973; 6 Nev. & M. 201; *Doe* d. *Madkins* v. *Horner*, 8 A. & E. 235; 3 Nev. & P. 344.

Thus, if the arbitrators award that one party shall give security to the other for the payment of 16*l.*, this is not a good award; because it does not appear what security, whether by bond or otherwise: *Thinne* v. *Rigby*, Cro. Jac. 314; *Samon's case*, *supra*; *Tipping* v. *Smith*, 2 Str. 1024. See *Cater* v. *Startut*, Roll. Abr. *Arbitr.* (H. 7); *Simmonds* v. *Swaine*, 1 Taun. 549. But an award of two things in the alternative, one of

Instances of awards void for uncertainty.

(*a*) It must of course be within the scope of the authority of the arbitrator, see *infra*, p. 160.

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which is uncertain or impossible, is good as to that which is certain: *Simmonds* v. *Swaine*, 1 Taun. 549; *Wharton* v. *King*, 2 B. & Ad. 528. An award to give a *bond* for payment is good: Roll. Abr. *Arbitr.* (E. 7); Com. Dig. *Arbitr.* (E. 15); *Cook* v. *Whorwood*, 2 Saund. 337; 2 Lev. 6; 2 Keb. 767. An award of a covenant of indemnity has been held good: *Philips* v. *Knightley*, 2 Str. 903. See *Ross* v. *Boards*, 8 A. & E. 290; 3 Nev. & P. 382; *Brown* v. *Watson*, 8 Scott, 386. An award "that the defendant shall deliver certain goods particularly named, and three boxes, and several books," without naming the books, is uncertain; *Cockson* v. *Ogle*, Lutw. 169. See *Price* v. *Popkin*, 2 Per. & D. 304; *Thorp* v. *Cole*, 2 Cr., M. & R. 367; so, also, an award "that one of the parties shall deliver up to the other a certain writing obligatory," *Bedam* v. *Clerkson*, 1 Ld. Raym. 123. So, an award that the defendant shall pay to the plaintiff such a sum of money, unless within twenty-one days (which in fact was after the time limited for making the award), the defendant shall exonerate himself by affidavit from certain payments and receipts, in which case he was only to pay a certain other less sum, is void, being uncertain and inconclusive: *Pedley* v. *Goddard*, 7 T. R. 73. See *Hopcraft* v. *Hickman*, 2 Sim. & St. 130; *Robinson* v. *Henderson*, 6 Mau. & S. 276. So, a letter by an arbitrator, containing a suggestion that one of the parties should pay a certain sum to the other, was held to be no award, because it did not direct that that should be done: *Lock* v. *Vulliamy*, 2 Nev. & M. 336; 5 B. & Ad. 600. See *Barton* v. *Ranson*, 3 M. & W. 322; *Matson* v. *Trower*, Ry. & M. 17; *Ferguson* v. *Norman*, 4 Bing. N. C. 52.

But the certainty of an award may be judged of according to a common intent, and consistent with fair and reasonable presumption; therefore, where the submission was in general terms of "*all* actions, controversies, and suits between the parties," and the arbitrator recited *one* which was depending, referring to the submission as authorizing him to determine it, the award was holden sufficiently certain; for there was no probable presumption of any other

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cause of complaint, the parties not having desired to be heard upon any more than that one: *Hawkins* v. *Colclough*, 1 Burr. 277. And an award that two persons shall pay a debt in proportion to the shares which they held in a certain ship, the ratio of their shares not being a subject of dispute, is sufficiently certain: *Wohlenberg* v. *Lageman*, 6 Taun. 254. See *Plummer* v. *Lee*, 2 M. & W. 495. When, however, under a reference by order of Nisi Prius, the arbitrator was to direct at what price the defendants, or A. B., who for that purpose became a party to the submission, should purchase a piece of land, and he awarded that it should be purchased by the defendants *or* A. B., it was held that the award was bad for uncertainty: *Lawrence* v. *Hodgson*, 1 Y. & J. 16; *Edgell* v. *Dallimore*, 11 Moo. 541.

Id certum est quod certum reddi potest.

An award that furnishes the rule by which a sum of money that is to be paid may be calculated, is as certain as if it had stated the sum: *Higgins* v. *Willes*, 3 Man. & Ry. 382. Therefore, where an action on a money bond, and all matters in difference, were referred, an award of a verdict to be entered for the plaintiff generally was held good: *Cayme* v. *Watts*, 3 D. & R. 224. See *Dicas* v. *Jay*, 2 Moo. & P. 448; *Platt* v. *Hall*, 2 M. & W. 391; *King* v. *Dundonald*, 5 Dowl. 589. But a reference to the market price of goods must state the day and the particular market: Roll. Abr. *Arbitr.* (Q. 7). See *Platt* v. *Hall*, 2 M. & W. 391. An award directing the payment of the costs of an action is good without fixing the amount of the costs, for that may be ascertained by the taxing officer: *Bradley* v. *Tunstow*, 1 Bos. & P. 34. And so it seems that an award of the costs of the award, without fixing the amount, is not bad for uncertainty, but the costs may be taxed by the officer of the Court. See *Miller* v. *Robe*, 3 Taun. 461; *Barrett* v. *Parry*, 4 Taun. 658; *Fitzgerald* v. *Graves*, 5 Taun. 342; *Mussellbrook* v. *Dunkin*, 2 Moo. & Sc. 740; *M'Arthur* v. *Campbell*, 2 Nev. & M. 444; 5 B. & Ad. 518; *Little* v. *Newton*, 2 Scott, N. R. 159.

Costs.

An award that "there is nothing due to the plain-

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tiff," and not, as it ought to be, that "there *was* nothing due at the time when the action was commenced," is sufficient, and is equivalent to a finding that the plaintiff had no cause of action, as it is to be presumed that things remain *in statu quo* from the time of the submission: *Dickins* v. *Jarvis*, 5 B. & C. 528; *S. C.*, nom. *Dickins* v. *Smith*, 8 D. & R. 285. So, an award of a release of all actions *to the time of the award* is good; because it shall be presumed that no differences have arisen since the submission, or at least because a release of all actions, &c. to the time of the submission would be a good performance of such an award: *Simon* v. *Gavil*, 1 Salk. 74; *Marks* v. *Marriot*, 1 Ld. Raym. 114; *Perry* v. *Nicholson*, 1 Burr. 278; *Hooper* v. *Pierce*, 12 Mod. 116. See *Doe* v. *Richardson*, 8 Taun. 698; *Trimingham* v. *Trimingham*, 4 Nev. & M. 786; *Petch* v. *Conlan*, 7 Dowl. 426; *Banfill* v. *Leigh*, 8 T. R. 571. It may be here observed, that if an act is directed to be done within a certain time from the date of the award, and the award bears no date, the time of delivery will be considered the date according to the original meaning of the word: *Armitt* v. *Breame*, 2 Ld. Raym. 1076; 1 Salk. 76.

Date of the award.

Sufficiency of award where a cause is referred.

When a cause is referred, it is not necessary that the arbitrator should find for the plaintiff or defendant in the very words of the issue; it is sufficient if he decide substantially the question at issue: *Wykes* v. *Shipton*, 3 Nev. & M. 240. Where there are several issues, and the costs depend upon the event of the award, it may be necessary to make a distinct finding upon each, in order that the costs may be ascertained. As to this, *vide infra*, p. 168.

Where an arbitrator merely finds a debt to be due, but does not in terms order the debtor to pay it, no attachment can be obtained for non-payment: *Edgell* v. *Dallimore*, 11 Moo. 541. See *Thornton* v. *Hornby*, 1 Moo. & Sc. 48.

Reference for the information of the Court.

As to the certainty which is requisite to an award upon a reference to find facts merely for the opinion of the Court, see *Teale* v. *Younge*, M'Clel. & Y. 497; *Phillips* v. *Hopwood*, 1 B. & Ad. 619; *Fergusson* v. *Norman*, 5 Scott, 304.

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What awards are sufficiently final.

Finality.]—"It is extremely clear that every award must be certain and final; but it has, particularly in modern times, been considered the duty of the Court in construing an award to find it certain and final, instead of leaning to a construction which, in effect, would destroy nine-tenths of the awards made; and, if possible, to put one common sense on all terms." Per Lord *Eldon*, C., *Wood* v. *Griffith*, 1 Swanst. 43. The distinction formerly taken between references with an *ita quod fiat de premissis* (*i. e.* conditional on the arbitrator's determining all matters, &c.), and without, that under the latter a partial award would be good, has been questioned in many modern cases: *Bradford* v. *Bryan*, Willes, 269; *Birks* v. *Trippet*, 1 Wms. Saund. 32.

Awards upon a submission, without an *ita quod*.

Wrightson v. *Bywater*.

This point was much discussed in the case of *Wrightson* v. *Bywater*, 3 M. & W. 199, which seems, when taken in connexion with the other authorities, to decide that, though an award which is not final may be bad, whether the reference is expressly made conditional upon the finality of the award or not; yet, if it plainly appear from the terms of the submission that the parties did not intend that the award should necessarily be complete and final, an award that does not embrace all the matters referred may be good.

Parke, B., in the course of his judgment, said—"The old rule was, that, unless the submission expressly made it conditional with an *ita quod*, an award of part only was good. This was laid down by Lord *Coke* in *Ormelade* v. *Coke*, Cro. Jac. 355; and it was so held in Dyer, 242, b; *Baspole's case*, 8 Rep. 98; and many other cases. In more modern cases it has been said that an express condition is not required; for, in *Bradford* v. *Bryan*, Willes, 270, *Willes*, C. J. says, 'I am willing to carry it as far as it has been carried already; because, were it not for the cases, I should be of opinion, that when all matters are submitted, though *without such condition*, all matters must be determined; because it was plainly not the intent of the parties that some matters only should be determined, and

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that they should be left at liberty to go to law for the rest. But beyond this, the cases have not gone, *and it is still the question, whether the parties intended all to be decided.*" See *Thorp* v. *Cole*, 2 Cr., M. & R. 367.

It will be prudent, in all cases where it is intended that the award shall determine all the matters in difference, to express such intention distinctly by a clause of *ita quod*, &c.

An award which settles the costs on both sides is final: *Hartnell* v. *Hill*, Forrest, 73; *Hawkins* v. *Colclough*, 1 Burr. 274. So is also an award that certain actions be *discontinued*, and each party pay his own costs, this being in effect an award of a *stet processus: Blanchard* v. *Lilly; R.* v. *Blanchard*, 9 East, 497. See *Simon* v. *Gavil*, 1 Salk. 74; *Knight* v. *Burton*, 1 Salk. 75; *Jackson* v. *Yabsley*, 5 B. & Al. 848; *Winter* v. *White*, 2 Moo. 723; *Pearse* v. *Pearse*, 9 B. & C. 484; *Leeming* v. *Fearnley*, 2 Nev. & M. 232; *Benwell* v. *Hinxman*, 1 Cr., M. & R. 935; *Eardley* v. *Steer*, 2 Cr., M. & R. 327; *Duckworth* v. *Harrison*, 4 M. & W. 432. Notwithstanding the award be final as to all matters referred and decided upon by the arbitrators, yet upon a reference of all matters in dispute between the parties, an award does not preclude the plaintiff from suing for a cause of action existing against the defendant at the time of the reference, upon proof that the subject-matter of such action was not laid before the arbitrators, nor included in the matters referred: nor is the award bad for omitting such matter: *Ravee* v. *Farmer*, 4 T. R. 146; *Martin* v. *Thornton*, 4 Esp. 180; *Risden* v. *Inglet*, Cro. Eliz. 838. But it is otherwise if it was plainly within the terms and scope of the reference: *Smith* v. *Johnson*, 15 East, 213. Therefore, upon a reference of all actions, controversies, &c., and also of two distinct matters of reference, if the arbitrator omit to decide one of such distinct matters, that vitiates the whole award: *Randall* v. *Randall*, 7 East, 81. So, where there are three or more parties to the reference, and all differences between them, or any two of them, are referred, an award which does not determine a difference between two of the parties

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is bad: *Winter* v. *White*, 2 Moo. 723. See Roll. Abr. *Arbitr.* (O. 8). So, where the parties submitted all matters in difference, and the arbitrator determined all matters except one, and gave liberty to one of the parties to prosecute that matter if he chose, it was held that the award was bad *in toto*: *Bradford* v. *Bryan*, Willes, 268; 7 Mod. 349; *Gray* v. *Gwennap*, 1 B. & Al. 106. See also *Middleton* v. *Wikes*, Roll. Abr. *Arbitr.* (L. 7); *George* v. *Lousley*, 8 East, 13; *Tribe* v. *Upperton*, 3 A. & E. 295; *Wykes* v. *Shipton*, 3 Nev. & M. 240; *Turner* v. *Turner*, 3 Russ. 494; *Bowes* v. *Fernie*, 4 My. & Cr. 150. And upon proof that any matter was laid before the arbitrator, which is not included in the award, whether actually disputed between the parties or not, the award may be set aside: *Re Robson* v. *Railston*, 1 B. & Ad. 723; *R.* v. *St. Katharine Dock Company*, 4 B. & Ad. 360; 1 Nev. & M. 121; *Stone* v. *Phillips*, 5 Scott, 275. And such omission may be pleaded and given in evidence in an action on the arbitration bond: *Bradford* v. *Bryan*, Willes, 268; *Mitchell* v. *Staveley*, 16 East, 58. See *Ingram* v. *Milnes*, 8 East, 445.

Arbitrator need not state the particular points adjudicated upon.

But it is not necessary that arbitrators in their award should distinctly refer in terms to the several points submitted to them, nor show the steps by which they have arrived at a conclusion. Thus, if the subject of the dispute be as to the value of certain property received by the respective parties, and the proportion in which they should contribute towards the payment of a certain sum of money, and the arbitrators, instead of finding distinctly as to each of these points, state generally, that they have taken the matters in difference into consideration, and award that one party shall pay to the other a certain sum, this is sufficient, provided it does not appear that any of the matters submitted have been excluded: *Birks* v. *Trippet*, 1 Wms. Saund. 33 a; *Aitcheson* v. *Cargey*, 9 Moo. 381. See *Re Glilon and the Mersey Navigation Company*, 3 B. & Ad. 493; *Re Brown and the Croydon Canal Company*, 1 Per. & D. 391; *Spence* v. *Eastern Counties Rail. Co.*, 7 Dowl. 697. In *Harrington* v. *Creswick*, 13 C. B. 399, a cause and all matters of difference were referred to an arbitrator. A cross claim was set up by the

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defendant. The arbitrator made his award "of and concerning the several premises so referred as aforesaid," whereby he disposed of all issues in favour of the plaintiff, directed that the defendant should pay to the plaintiff a gross sum, that the cost should be apportioned, and that upon payment the plaintiff should execute a general release to the defendant; but he did not notice the counter-claim in the award. The Court, nevertheless, held the award to be final. In the course of his judgment, *Parke*, B., said, "Where an award is *de premissis*, the presumption is that the arbitrator intended to dispose finally of all matters in difference; and his award will be held final if by any intendment it can be made so. The rule is this, when there is a further claim made by the plaintiff, or a cross demand set up by the defendant, and the award, purporting to be made of and concerning the matters referred, is silent respecting such further claim or cross demand, the award amounts to an adjudication that the plaintiff has no further claim, or that the defendant's cross-demand is untenable; but where the matter so set up requires to be specifically adjudicated upon, mere silence will not do." See also *Duke of Beaufort* v. *Swansea Harbour Trustees*, 8 C. B., N. S. 146; *Whitworth* v. *Hulse*, L. R., 1 Ex. 251; *Jewell* v. *Christie*, L. R., 2 C. P. 296. An award of general releases will be presumed to have been made with reference to all the matters submitted: *Wharton* v. *King*, 2 B. & Ad. 528. See *Cayhill* v. *Fitzgerald*, 1 Wils. 28, 58; *Pearse* v. *Pearse*, 9 B. & C. 484; *Bird* v. *Cooper*, 4 Dowl. 148; *Cayme* v. *Watts*, 3 D. & R. 224; *Hayllar* v. *Ellis*, 3 Moo. & P. 553; *Plummer* v. *Lee*, 2 M. & W. 495; *Re Rider and Fisher*, 5 Scott, 86.

The award need not state that it is made concerning the matters in difference.

Upon the trial of an action of tort, a verdict was found for the plaintiff, subject to a reference of all matters in difference; the defendant claimed before the arbitrator a sum of money due to him upon the balance of an account, which was admitted by the plaintiff to be due; the award without stating that it was made *of and concerning* the premises, directed a verdict to be entered for the plaintiff with damages; and as the award recited that all matters in difference between the parties were referred to the arbi-

trator, it was held sufficient: *Gray* v. *Gwennap*, 1 B. & Al. 106. For it will be presumed, that all the matters referred have been laid before the arbitrator, and that he has adjudicated upon them: *Crofton* v. *Connor*, 1 Bro. P. C. 530. See *Hayllar* v. *Ellis*, 3 Moo. & P. 553; *Lancaster* v. *Hemmington*, 5 Nev. & M. 538; *Doe* d. *Madkins* v. *Horner*, 8 A. & E. 235; 3 Nev. & P. 344; *Re Brown and the Croydon Canal Company*, 1 Per. & D. 391. This presumption will not, however, be made if the award is not *de premissis*: *King* v. *Bowen*, 8 M. & W. 625. It is a fatal objection to an award, that, *upon the face of it*, it does not decide all matters in difference agreeably to the terms of the reference: *Winter* v. *Munton*, 2 Moo. 723. See *Biddle* v. *Dowse*, 9 D. & R. 404; 6 B. & C. 255; *Wrightson* v. *Bywater*, *ante*, p. 155; *Doe* d. *Madkins* v. *Horner*, 8 A. & E. 235; 3 Nev. & P. 344; *Gisborne* v. *Hart*, 5 M. & W. 50.

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If the arbitrators reserve any future power or discretion, the award is bad for want of finality: *Selby* v. *Russell*, Comb. 456; 12 Mod. 139; *Pedley* v. *Goddard*, 7 T. R. 73; *Winter* v. *Lethbridge*, 13 Price, 533; *Manser* v. *Heaver*, 3 B. & Ad. 295. And it is equally bad if it give a discretion or power to a third person, or even to the Court: Roll. Abr. *Arbitr.* (B. 20), (H. 11); *Glover* v. *Barrie*, 1 Salk. 71; *Tomlin* v. *Mayor, &c. of Fordwich*, 5 A. & E. 147; *Barton* v. *Ranson*, 3 M. & W. 322. But the mere leaving of any particular to be determined by a stranger, acting *ministerially*, and not judicially, does not vitiate the award(*a*). As, if it award such conveyances or releases to be made as counsel shall approve; Roll. Abr. *Arbitr.* (I. 5, 7); *Carter* v. *Startute*, Sty. 217; or that costs shall be taxed by the Master, or even a release to be settled by the Master; *Lingood* v. *Eade*, 2 Atk. 501; or that a sum shall be paid for every acre of a particular close, to be measured by an able measurer: *Hunter* v. *Bennison*, Hardr. 43. See *Thorp* v. *Cole*, 2 Cr., M. & R. 367.

Arbitrator cannot reserve any discretion;

nor delegate his authority.

Ministerial acts distinguished from *judicial*.

(*a*) An arbitrator may obtain the advice or assistance of, or a report from any person on any question of law or fact, provided he use his own judgment and discretion in acting upon the advice, information or report so obtained: see *Anderson* v. *Wallace*, 3 Cl. & F. 26.

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An award that is to be affected by subsequent evidence is bad: *Winch* v. *Sanders*, Cro. Jac. 584; *Selsby* v. *Russell*, Comb. 456; *Pedley* v. *Goddard*, 7 T. R. 73. But see *Price* v. *Hollis*, 1 Mau. & S. 105. But the award may be good as to everything except the reservation of future authority: *Manser* v. *Heaver*, 3 B. & Ad. 295.

Courts disinclined to entertain technical objections.

Where the objection to an award is purely of a technical nature, and is inconsistent with the plain moral justice of the case, the Court will not readily lend its assistance to set it aside. Thus, where an action was referred, which was brought upon an agreement which contained a provision that, in case of the breach of the agreement, one of the parties should pay to the other the sum of 100*l.*, to be recovered as a stipulated debt, and not as a penalty; the arbitrator awarded 10*l.* only for damages, and it was contended that he ought to have awarded the whole sum of 100*l.*, the parties having themselves assessed the damages at this sum; but the Court refused to set aside the award, on the ground of the unconscientious nature of the objection, and its not being proved that the attention of the arbitrator was drawn to the clause in question: *Pinkerton* v. *Caslon*, 2 B. & Al. 704.

An award is void, if performance would be a forfeiture.

An award between a lessee and his neighbour, awarding an act to be done for the benefit of the latter by the lessee, which would be waste upon the estate of lessor, is bad: *Alder* v. *Savill*, 5 Taun. 454. As to the reasonableness necessary to an award, see Roll. Abr. *Arbitr.* (B. 11, 12, 13); 1 Vern. 157; 2 Vern. 250; 1 Ch. Ca. 279. It must not direct any act to be done, which is against the policy of the law; 1 Swanst. 55; and it must be advantageous to one of the parties: Roll. Abr. *Arbitr.* (I. 10, 11, 12). See further on this point, *infra*, p. 183.

Award must be within Arbitrator's Authority.]—Another requisite of an award, of course, is, that the matters which it directs to be done are within the scope of the arbitrator's authority. As to the construction of submissions to arbitration, *vide ante*, p. 123. Thus, where parties had entered into an agreement, from the 1st of May, 1801, for a lease of

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a colliery for sixty-three years; the lessees to be allowed three years for winning the colliery, without paying any rent; and it was referred to an arbitrator to settle the terms of a lease according to the agreement; and he directed a lease to be made from the 1st of May, 1804; it was held that he had exceeded his authority, and the award was therefore bad: *Bonner* v. *Liddell*, 1 Br. & B. 80. So, an award of general releases between the parties is void where the submission is not general, and it is shown that there are differences existing which were not referred: Roll. Abr. *Arbitr.* (B. 23); *Hill* v. *Thorn*, 2 Mod. 309.

An award that one of the parties shall give another any specific chattel the right to which was not referred is void, for money is the only fit measure of satisfaction: Roll. Abr. *Arbitr.* (B. 11, 12, 13). See *Parsloe* v. *Baily*, 1 Salk. 76; *Price* v. *Popkin*, 2 Per. & D. 304. So, where disputes as to the validity of a title were referred, an award directing that the title should be taken with a bond of indemnity was held bad: *Ross* v. *Beards*, 3 Nev. & P. 382.

Practice where a cause is referred.

Arbitrator's authority to direct a verdict.

When a cause is referred by consent, it is usual either to enter up a verdict, subject to the award of the arbitrator, see *ante*, p. 97; or to authorize the arbitrator to direct a verdict to be entered. Without such authority the arbitrator has no power to direct a verdict to be entered; and therefore, where parties agreed to refer a cause, and the subject-matter thereof, and the *issue* therein, and the costs of the action to arbitration, and that the submission should be made a rule of Court, it was held that the arbitrator had no power to direct a verdict to be entered: *Hutchinson* v. *Blackwell*, 1 Moo. & Sc. 513. See *Donlan* v. *Brett*, 4 Nev. & M. 854; 2 A. & E. 344; *Harding* v. *Forshaw*, 1 M. & W. 415; *Hayward* v. *Phillips*, 1 Nev. & P. 288. A distinction has, however, been taken in several more recent cases where the arbitrators, without formally directing a verdict to be entered, use such expressions as "I award a verdict in favour," &c., or "I award that a verdict be entered for," &c., which are regarded merely as indications of the arbitrator's own opinion, and the Court has accordingly upheld the awards so made: *Everest* v.

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Ritchie, 7 H. & N. 698; *Law* v. *Blackburrow*, 14 C. B. 77; *Mays* v. *Cannel*, 24 L. J., N. S., C. P. 41.

Where a replevin suit and all disputes concerning the amount of rent due were referred, the costs to abide the event of the award, an award finding a certain amount of rent to be due, and directing that the action should be discontinued, was held bad. The arbitrator had no authority to order a *stet processus*, but should have directed a verdict to be entered either for the plaintiff or defendant: *Leeming* v. *Fearnley*, 5 B. & Ad. 403; 2 Nev. & M. 232. See *Hunt* v. *Hunt*, 5 Dowl. 442, *et vide infra* as to costs.

What amounts to an award of a verdict.

Where to an action of *assumpsit* on a builder's bill, the particulars of demand being 104*l.*, the defendant pleaded payment of 30*l.* before action brought and payment into Court of 45*l.* more; and the cause being referred to a surveyor to measure and value the plaintiff's work, and to certify for whom and for what amount the verdict was to be entered, he certified that 74*l.* 7*s.* was a proper sum *to be paid* by the defendant to the plaintiff, it was held that this amounted to a verdict for the defendant: *Salter* v. *Yates*, 2 M. & W. 67. See *Platt* v. *Hall*, 2 M. & W. 391; *Mortin* v. *Burge*, 4 A. & E. 973; *Smith* v. *Festiniog Railway Company*, 5 Scott, 255; *Taylor* v. *Shuttleworth*, 8 Dowl. 281.

Award must not exceed the verdict.

Where a verdict is taken for a particular amount, the arbitrator cannot award damages beyond that amount: *Bonner* v. *Charlton*, 5 East, 139; *Hayward* v. *Phillips*, 1 Nev. & P. 288; 6 A. & E. 119; *ante*, p. 98.

Effect of arbitrator exceeding his authority.

If the arbitrator take into consideration any matter that is not submitted to him, and found any part of his award upon it, it will be bad, either *pro tanto* or wholly, according as the improper part can or cannot be separated from the rest of the award. Thus, if the question of the amount only of certain claims be referred, and the arbitrator take into consideration their legal validity, his award is bad: *Harries* v. *Thomas*, 2 M. & W. 32. And a defect of this nature, if it do not appear on the face of the award, may be made out by extrinsic evidence: *Ib.*

Evidence of excess.

Award that a stranger shall do any act.

An award that a stranger shall do any act is void *pro tanto* at least, and altogether if the act of the

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stranger is made an equivalent for something to be done on the other side. Thus, an award that a party *and his wife and heir apparent* should convey land, is void: *Barney* v. *Faierchilde*, Roll. Abr. *Arbitr.* (N. 9); *Evans* v. *Cogan*, 2 P. Wms. 450. But if by the submission either party binds himself to procure the performance of the award by a stranger, then an award of an act to be done by such stranger is good, as being equivalent to an award that the party shall procure the act to be done. See *Cayhill* v. *Fitzgerald*, 1 Wils. 28, 58; *Shelf* v. *Baily*, 1 Comyn, 183.

Excess.

An award that one of the parties shall be bound with sureties for payment of the money, is void as to the sureties; but, as such an award is only void for the excess, the party himself is in such a case bound: *Norwich* v. *Norwich*, cited Cro. Eliz. 4; 3 Leon. 62; 1 Roll. Abr. 259, pl. 7; 3 Vin. Abr. 35; *Coke* v. *Whorwood*, 2 Lev. 6; 2 Saund. 337. Where the arbitrator awarded that the defendant should pay to the plaintiff, on a certain day, 100*l.*, or should find two sufficient sureties, to be bound with him to the plaintiff to pay the 100*l.* to the plaintiff by 20*l.* a year, until the whole sum be paid, the Court was clearly of opinion, "that although the award be set down and conceived in words disjunctive, yet, in law and in substance, it is single; for, as to the finding of sureties, the award was void, and so nothing is awarded but the payment of the 100*l.* at the day:" *Oldfield* v. *Wilmers*, 1 Leon. 140, 304; *Thirsby* v. *Helbot*, 3 Mod. 372.

Money to be paid to a stranger, &c.

An award of money to be paid to, or any act to be done in favour of a stranger, is void, unless it can be collected that such payment is to be made or act done for the benefit of a party to the reference: Roll. *Arbitr.* (E. 5, F. 8); *Adams* v. *Statham*, 2 Lev. 235; *Bedam* v. *Clerkson*, 1 Ld. Raym. 123; *Bradsey* v. *Clyston*, Cro. Car. 541; *Becket* v. *Taylor*, 2 Keb. 546, 554; 1 Mod. 9; *Bird* v. *Bird*, 1 Salk. 74; *Lynch* v. *Clemence*, Lutw. 179; *Fisher* v. *Pimbley*, 11 East, 188; *Snook* v. *Hellyer*, 2 Chitt. 43; *Re Skeete*, 7 Dowl. 618. But where, on a reference by partners, the arbitrator awarded that some of the parties

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should pay money to the arbitrator, and that he should apply the same in payment of certain specified demands, "but subject to all equities between the said parties as partners in the said firms," the award was set aside, as the arbitrators had no means of enforcing the proper application of the money by the arbitrator to whom it was directed to be paid: *Re Mackay*, 2 A. & E. 356.

Award that money shall be paid to a stranger for the use of one of the parties.

It has been held that an award directing payment to one person for the use of another is good; though the party to receive the money may not appear to be invested with any express authority by the person for whom the money was to be paid: *Snook* v. *Hellyer*, 2 Chitt. 43.

On a reference of all differences between partners, the arbitrator may award a dissolution.

On a dispute between two partners, all matters in difference were referred to arbitration in the common form. The arbitrator, among other things, directed the partnership to be dissolved. On a motion to set aside the award, it was held that the arbitrator had exceeded his power: *Green* v. *Waring*, 1 W. Bl. 475. And see 1 Roll. Abr. 242, pl. 2; 3 Vin. Abr. 42. An arbitrator who has power to award a dissolution of partnership is not bound to do so: *Simmonds* v. *Swaine*, 1 Taun. 549. An arbitrator with power to determine on what terms a partnership agreement is to be cancelled may authorize one of the partners to sue for debts in the name of the other: *Burton* v. *Wigmore*, 1 Scott, 610. See *Wood* v. *Wilson*, 2 Cr., M. & R. 241; *Tattersall* v. *Groote*, 2 Bos. & P. 131; *Morley* v. *Newman*, 5 D. & R. 317.

Award may be good in part and bad in part.

An award may be good in part, and bad in part, provided the latter be independent of and unconnected with the former: *Hartnell* v. *Hill*, Forrest, 73; *George* v. *Lousley*, 8 East, 13; *Aitcheson* v. *Cargey*, 9 Moo. 381; *Hooper* v. *Hooper*, M'Clel. & Y. 509; *Winter* v. *Lethbridge*, M'Clel. 253; 13 Price, 533; *Stone* v. *Phillips*, 5 Scott, 275; and *Duke of Buccleuch* v. *Metropolitan Board of Works*, L. R., 5 Ex. 221; at p. 229, where *Blackburn*, J., stated the rule on the subject as follows: "An award is the decision of one having a limited authority to determine those matters submitted to him by the parties, or, as in the present case, by a statute, and no other. And

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from this it follows that if that limited authority has not been pursued, and the arbitrator has awarded something beyond the authority, the award is *pro tanto* void, and if the void part is so mixed up with the rest that it cannot be rejected, the award is void altogether, otherwise those against whom the award is made would be compelled to fulfil the void part." Thus, where it was awarded that one party should pay to the other a certain sum of money, and should also pay the costs of the arbitration, and then, that each party should give a release to the other; the Court held, that since no specific authority as to the costs of reference had been vested in the arbitrators by the submission, and it being a matter arising subsequent to the time of the submission, that part of the award which concerned the costs of the reference was bad, but that the whole award was not on this account to be rejected: *Candler* v. *Fuller*, Willes, 64; *Addison* v. *Grey*, 2 Wils. 293; *Pinkeny* v. *Bullock*, 2 Lev. 3; *Bargrave* v. *Atkins*, 3 Lev. 413; *Firth* v. *Robinson*, 1 B. & C. 277; *Rees* v. *Waters*, 16 M. & W. 263.

Instances of awards being void *pro tanto* only.

Again, where an action was referred to an arbitrator, and the rule of reference stated that if the arbitrator should award that the plaintiff had any cause of action, he should have costs as in a Court of law, but if he should award otherwise, then the defendant was to have his costs; the arbitrator by his award directed that the defendant should give up the premises to the plaintiff, that he should pay the costs of the action, and pay 4*l.* 1*s.* for the loss of rent during the time that he held over; but did not award that the plaintiff had any cause of action. The arbitrator also directed that, on performance of the award, each of the parties should, at the charges of each other, execute releases from the beginning of the world to the day of the date of the award. It was objected, that the arbitrator ought to have found that the plaintiff had a good cause of action, and that the direction to the parties to execute mutual general releases, was bad, as exceeding the authority, and vitiated the whole award; on the former point, the Court held, that the arbitrator was not bound to state that which was a necessary con-

Award good in part.

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sequence of his award, namely, that the plaintiff had a cause of action; the Court also determined that the award was void as to that part which related to the releases, but was not affected thereby as to the other parts of it: *Doe* d. *Williams* v. *Richardson*, 8 Taun. 697. See *Caila* v. *Elgood*, 2 D. & R. 193 (*z*). So, where an award directed that a lease should be made to a party to the submission for life, with remainder to a stranger to the submission, in fee, the latter part was declared to be totally void; but that the rest of the award was not, on that account, the less valid: *Bretton* v. *Prat*, Cro. Eliz. 758. So, where an arbitrator awarded a sum of money to one party; and it appeared by the award that part of the supposed debt took its rise from an illegal transaction; the Court ordered so much to be struck out of the sum awarded, but without prejudice to the rest of the award: *Aubert* v. *Maze*, 2 Bos. & P. 371. So, where the submission was of *all matters* in difference between the parties, an award of so much to be paid by the defendant to the plaintiffs was held good for so much, though the arbitrators also awarded a sum to be paid by the plaintiffs to the defendant out of a fund, in which others were interested, who were no parties to the submission: *Ingram* v. *Milnes*, 8 East, 445. So, if an award be made between A. of the one part, and B. of the other, by which it is awarded that A. should pay 10*l.* to B., and also that A. should pay 5*l.* to a stranger, and that B. should give A. a general release; here the award to pay 5*l.* to the stranger is void, and yet the award is good for the residue; for B. is not prejudiced though the 5*l.* be not paid to the stranger, for no more than 10*l.* was intended for him or his benefit: *Argu.*, *Pope* v. *Brett*, 2 Saund. 293; *Samon* v. *Pitt*, 1 Roll. Abr. *Arbitr.* (N. 8); Cro. Eliz. 432. So, if an award be made that A. shall do certain works, and that if any dispute shall arise respecting the performance, the arbitrator shall decide such disputes, the award is

The part of an award to be performed by or to a stranger, is void.

(*z*) To avoid questions of this nature an award should always be framed in as strict adherence as possible to the terms of the agreement to refer.

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good as to the former part, though bad as to the latter: *Manser* v. *Heaver*, 3 B. & Ad. 295. So, where all matters in difference in a cause were referred, and the arbitrator awarded that a certain sum was due from the defendant to the plaintiff, and directed that it should be paid by a certain day, the award was held good as to the finding of the sum due, and bad as to the direction for payment: *Benwell* v. *Hinxman*, 1 Cr., M. & R. 935. So, where the arbitrator to whom a cause was referred, stated all the facts in his award, and awarded the action in favour of the defendant, and directed by whom the costs should be paid, adding, "But if the Court shall be of opinion, upon the facts hereinbefore stated, that the plaintiff is entitled to recover in the action, then I determine the action in favour of the plaintiff, and order an award that the defendant pay damages to the plaintiff to the amount of one shilling, and also pay to the plaintiff the cost of the reference." It was held, that the award was good, rejecting the latter part: *Barton* v. *Ranson*, 3 M. & W. 322. See *Price* v. *Hollis*, 1 Mau. & S. 105.

An award that A. shall pay B. a sum, and B. pay A. a less sum at a subsequent day is void.

If the arbitrators award A. to pay B. 100*l.*, and award A. and B. to give general releases to each other, and then award B. to pay A. 20*l.* at a subsequent time, the whole award is bad, such award being quite inconsistent with common sense: *Storke* v. *De Smeth*, Willes, 69.

If one of the parties cannot have the advantage intended him, as a recompense for what he is to do to the other, the award is void *in toto*.

If, by the nullity of the award in any part, one of the parties cannot have the advantage intended him as a recompense or consideration for that which he is to do to the other, the award is void in the whole: 1 Roll. Abr. 259, pl. 9, 10; Com. Dig. *Arbitrament* (E. 19). See *Birks* v. *Trippet*, 1 Saund. 32; *Veale* v. *Warner*, 1 Wms. Saund. 324; *Hodsden* v. *Harridge*, 2 Saund. 61; *Coppin* v. *Hurnard*, 2 Saund. 127; Wms. n. 2 Saund. 293 (1). Therefore, an award that A. shall be paid by B. money due for task work, and then A. should pay 25*l.* to B., and that the parties should give each other a general release, is void in the whole, for the uncertainty what sum should be paid for task work: *Pope* v. *Brett*, 2 Saund. 292. So, if the illegal part cannot

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be separated from that which is authorized, the award necessarily fails *in toto;* but when an entire sum is awarded, partly on a good ground and partly without authority, the Court will apportion it if it can collect a certain rule for that purpose from the award. See *Barker* v. *Tibson*, 2 W. Bl. 953; *Bonner* v. *Charlton*, 5 East, 139, 144; *George* v. *Lousley*, 8 East, 13; *Watkins* v. *Philpots*, M'Clel. & Y. 393; *Auriol* v. *Smith*, Turn. & R. 121; *Bowes* v. *Fernie*, 4 My. & Cr. 150; *Tomlin* v. *Mayor of Fordwich*, 5 A. & E. 147.

When an award is bad in part, the party desiring to enforce performance of it by attachment must confine his previous demand of performance to that part which is good: *Whitehead* v. *Firth*, 12 East, 165; *Strutt* v. *Rogers*, 7 Taun. 213.

COSTS.

Power of arbitrators as to costs.

Costs.]—When a cause is depending, the submission is either silent with respect to *costs*, or they are directed to abide the event of the award, or else to be in the discretion of the arbitrator. The power of awarding the costs of the cause is necessarily consequent to the authority conferred upon the arbitrator of determining the cause; but such authority does not empower him to allow costs of the reference or award: *Roe* d. *Wood* v. *Doe*, 2 T. R. 644; *Anon.*, Lofft, 34; *Whitehead* v. *Firth*, 12 East, 165. And in *Mordue* v. *Palmer*, L. R., 6 Ch. 22, it was held that an arbitrator to whom the matters in issue in a suit have been referred by the Court has power to award costs as between solicitor and client. See also *Hartnell* v. *Hill*, Forrest, 73.

Direction that costs shall abide the event.

Costs of the reference where no cause.

When there is no cause depending, the arbitrators cannot award the costs of the reference, unless power be expressly given to them for that purpose, because such costs arise subsequent to the submission, and therefore cannot, without express words, be included in it: *Candler* v. *Fuller*, Willes, 62; *Bell* v. *Belson*, Chitt. 157. See *Kendrick* v. *Davies*, 5 Dowl. 693; *Strutt* v. *Rogers*, 2 Marsh. 524; 7 Taun. 213. If no directions be given respecting the costs of a reference or award, each party must pay his own costs of the reference, and those of the award must be paid

by both parties equally: *Grove* v. *Cox*, 1 Taun. 165; *Whitehead* v. *Firth*, 12 East, 165; *Bell* v. *Belson*, 2 Chitt. 157; *Firth* v. *Robinson*, 1 B. & C. 277; *Taylor* v. *Lady Gordon*, 2 Moo. & Sc. 725. Where a submission empowers the arbitrator to direct as to the costs of the reference, he has also power to direct as to the costs of the award: *Walker* v. *Brown*, 51 L. J., Q. B. D. 424. In the case of a compulsory reference under the Common Law Procedure Act, 1854, when the order of reference is silent as to costs, the arbitrator has no power to adjudicate thereon: *Bell* v. *Postlethwaite*, 25 L. J., N. S., Q. B. 63; *Wimshurst* v. *Barrow Ship Building Co.*, 2 Q. B. D. 335.

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As to costs in references under the Lands Clauses Act, 1845, see sect. 34 of that Act, *ante*, p. 112. And as to references under the Railways Clauses Consolidation Act, 1845, see *ante*, p. 114.

When a cause has been referred by an order of Nisi Prius, or rule of Court, and the costs are directed to abide *the event* of the award, that must be taken to mean the *legal event;* and the party in whose favour the award is made, will be entitled to no more costs than if, the cause having proceeded to trial, he had obtained a verdict to the same effect as the award: *Highnam* v. *Hassell*, cit. 3 T. R. 139; *Willis* v. *Osborne*, 1 Chitt. 183.

Direction that costs shall abide *the event* means the *legal event.*

Where money had been paid into Court, and the arbitrator awarded that the plaintiff had not any cause of action beyond the sum paid into Court, it was held that the defendant was entitled to the costs of the reference, the costs being directed to abide the event: *Dawson* v. *Garrett*, 2 Dowl. 624. So in an action of trespass referred under a rule of Nisi Prius, the arbitrator awarded a right of way to the defendants different from any of those pleaded for them, and found *five shillings* damages to the plaintiff for the assault, as having been committed when the defendants were attempting to exercise a right of way negatived by the arbitrator; the Court held, that the plaintiff can recover no more costs than damages; for the arbitrator's award is not tantamount to a judge's certificate under the 22 & 23

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Car. 2, c. 9 : *Swinglehurst* v. *Altham*, 3 T. R. 138. Therefore, where a verdict was taken for 10*l.* in trespass, subject to an award of damages, and the costs were directed to abide the event, if the arbitrator find less than 40*s.* damages, the plaintiff cannot have his costs, though it be also found that the trespass was wilful, and that the defendant should pay the plaintiff his costs; for costs being directed to abide the event, means the legal event; and the authority of a judge to certify for costs, under the 22 & 23 Car. 2, c. 9, where the trespass is wilful, is not transferred to the arbitrator, under such a rule of reference: *Ward* v. *Mallinder*, 5 East, 489. And see 1 Chitt. 185. Where an indictment was referred,

Arbitrator's power to certify for costs.

the defendant agreeing to pay the costs if he should be found guilty, and the arbitrator found him guilty, it was held that he was not liable for the costs of a special jury moved for by the prosecutor, because the arbitrator had no power to certify under the 6 Geo. 4, c. 50, s. 34, and the judge had not done so: *R.* v. *Moate*, 3 B. & Ad. 237. Parties may by the order of reference give the arbitrator the same power as to costs which a judge at Nisi Prius has. In executing this power, the arbitrator must in all essentials follow the rules laid down for the guidance of the judges: *i.e.* he must give his certificate whether the verdict is to have the effect of carrying costs *immediately* upon making the award: *Spain* v. *Cadell*, 5 Jur. 322. Costs of a special jury left

Costs of special jury.

in the discretion of the arbitrator, the costs generally being directed to abide the event, can only be allowed to the party moving for the jury in case he succeeds: *Finlayson* v. *M'Leod*, 1 B. & Al. 663.

Under 43 Geo. 3, c. 46, s. 3, if the costs are directed to abide the event, and the arbitrator find a less sum to be due than that for which the defendant was arrested, it is

Where the verdict was taken at the trial for a nominal sum, subject to an order of reference for ascertaining the amount of the damages, by which the costs were directed to abide *the event* of the award, and the arbitrator found a less sum to be due to the plaintiff than that for which the defendant was arrested, the Court held that the sum so found, and for which judgment was afterwards given, was to be considered as a sum *recovered*,

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within the meaning of the Act 43 Geo. 3, c. 46, s. 3 (for prevention of frivolous and vexatious arrests and suits), so as to entitle the defendant to apply for costs: *Neale* v. *Porter*, and *Burns* v. *Palmer*, 2 Tidd, 983, 9th ed. But in order to bring a case within the statute, a verdict must be taken, on which judgment may be entered up: *Keene* v. *Deeble*, 3 B. & C. 491. In a case where a reference was made in a cause in which the plaintiff had arrested the defendant for 179*l.*, and one of the terms of the reference was, that *the costs of the cause should abide the event of the award*, and the arbitrator by his award found that, at the commencement of the suit, there was due from the defendant to the plaintiff the sum of 45*l.* 18*s.*, and that the plaintiff had no reasonable or probable cause for arresting the defendant for 179*l.*; and that the defendant by reason thereof was entitled to compensation or damages to the amount of 20*l.*; and the arbitrator then ordered the verdict to be finally entered for the plaintiff for 25*l.* 18*s.*, the balance due to him after deducting therefrom the damages awarded to the defendant; the Court refused to allow the defendant costs under the statute (43 Geo. 3, c. 46), "the event" of the award being in favour of the plaintiff: *Thompson* v. *Atkinson*, 6 B. & C. 193. In *Silversides* v. *Bowley*, 1 Moo. 92, and *Payne* v. *Acton*, 1 Br. & B. 278, the costs were not directed to abide the event of the award, which is the reason why the defendants applied for costs, on the ground of the arrests being vexatious and malicious. See *Turner* v. *Prince*, 2 Moo. & P. 305; *Summers* v. *Grosvenor*, 2 Cr. & M. 341; *Reynolds* v. *Flower*, 3 Moo. & Sc. 801; *Holder* v. *Raitt*, 2 A. & E. 445.

a sum *recovered* within the Act;

but it is otherwise if the costs are not directed to abide the event.

Where a cause was referred to arbitration by rule of Nisi Prius, and the costs were to abide the event of the award, and the arbitrators awarded that the plaintiff's original demand was only 37*s.*, the Court held that the plaintiff was not entitled to costs, any more than he would have been if, on a trial, he had recovered under 40*s.*; since if a jury had found a verdict for a similar amount, on a suggestion to be entered by leave of the Court, the defendant would have been entitled to costs: *Butler* v. *Grubb*, cited 3 T. R. 139.

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If the event *in fact* is in favour of the plaintiff, he is entitled to costs.

But where a cause is referred to arbitration, and the costs are to abide the event, and the arbitrator awards something to be done, which proves that the event in fact is in favour of the plaintiff, he is entitled to costs, although the arbitrator do not award a verdict to be entered for him. Thus, where an action of trover for corn, &c., having been referred, with a proviso that the costs should abide the event, and the arbitrator awarded to the plaintiff a right of going into a certain barn to thresh his corn there, &c., but omitted to give the plaintiff his costs, and directed a verdict to be entered for him, the Court held that the plaintiff was entitled to his costs, they being to abide the event of the award, not of the action: *Anon.*, 1 Smith, 426. See *Eardley* v. *Steer*, 2 Cr., M. & R. 327. But it is essential, where costs are directed to abide the event, that the arbitrator should make in substance a legal adjudication on the action. See *Duke of Beaufort* v. *Welch*, 10 A. & E. 527; *Bird* v. *Penrice*, 6 M. & W. 754. And therefore, where the arbitrator made a decision on the issues joined, but did not award damages on a new assignment on which there was judgment by default, the award was held bad: *Wykes* v. *Shipton*, 3 Nev. & M. 240. So where the arbitrator awarded that the action should cease, without determining it on either side: *Leeming* v. *Fearnley*, 5 B. & Ad. 403; 2 Nev. & M. 232.

In some old cases it was held that the omission to determine an issue would not vitiate the award; for if the parties had intended that each issue should be determined separately they should have so stated it. See *Dibben* v. *Marquess of Anglesey*, 10 Bing. 568; *Duckworth* v. *Harrison*, 4 M. & W. 432. But it may now be regarded as a settled rule that an arbitrator must determine all the issues, and that otherwise the award will be bad: *Hunt* v. *Hunt*, 5 Dowl. 442; *Rennie* v. *Mills*, 7 Scott, 276; *Gisborne* v. *Hart*, 5 M. & W. 50.

Where there are several matters in difference which are referred, and it is directed that the costs shall abide the event of the award, each party must pay his own costs, unless all the matters in difference

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are decided in favour of one of them, and any direction as to them by the arbitrator is a nullity: *Boodle* v. *Davies*, 4 Nev. & M. 788, 795. An award that all proceedings shall cease carries with it as consequence that each party shall pay his own costs: *Yates* v. *Knight*, 2 Bing. N. C. 277.

Double costs in replevin.

As the statute 11 Geo. 2, c. 19, s. 22, gives double costs against a plaintiff in replevin only in three cases, namely, where he is nonsuit, discontinues his action, or has judgment given against him; therefore, where, in replevin, the cause not being then at issue, the parties agreed by bond to submit the question to arbitration, the costs to abide the event of the reference, and he awarded in favour of the defendant, it was held that he was not entitled to double costs under the statute; if the arbitrator had awarded a discontinuance it would have been different: *Gurney* v. *Buller*, 1 B. & Al. 670.

Costs as between attorney and client.

An arbitrator, under a rule of reference, which directs that the costs of the cause shall abide the event, has no power to direct those costs to be taxed as between attorney and client: *Marder* v. *Cox*, Cowp. 127; *Seccombe* v. *Babb*, 6 M. & W. 129. The award will fail in part or wholly according as the invalid direction is separable or not from the rest of the award: *ante*, p. 164. The successful party may waive any such illegal direction that is for his benefit: *Whitehead* v. *Firth*, 12 East, 165; *Jackson* v. *Clarke*, M'Clel. & Y. 200. See *Moore* v. *Butlin*, 2 Nev. & P. 436.

Waiver of illegal part.

If by the rule the costs are to abide the event, it includes both the costs of reference and of the cause.

Even where the costs of a cause are not expressly to abide the event of the award, yet, if the arbitrator direct a verdict to be entered, which would carry costs (as for 40*s.* damages) in an action of trespass, the party in whose favour the verdict is to be entered will be entitled to costs as consequent thereon without any express direction: *Young* v. *Gye*, 10 Moo. 198; *Mackintosh* v. *Blyth*, 1 Bing. 269. Although costs of a reference under an order of Nisi Prius are not generally costs in the cause, *ante*, p. 168, yet where the reference was entirely for the benefit of the party who succeeded, it was held that the costs of the reference were included in the

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general direction as to the costs in the cause: *Tregoning* v. *Attenborough*, 5 Moo. & P. 453. See also *Sim* v. *Edwards*, 17 C. B. 527.

In a compulsory reference under the Common Law Procedure Act, 1854, "the costs of the reference and award are part and parcel of the costs of the cause:" per *Kelly*, C. B., in *Forshaw* v. *De Wette*, L. R., 6 Ex. at p. 203.

Power of arbitrator as to costs when they are left to his *discretion*.

Where a cause is referred, and the costs are left to the *discretion* of the arbitrator, he may either award a *gross sum* to be paid for costs; *Shephard* v. *Brand*, Ca. t. Hardw. 53; *Anon.*, 1 Chitt. 38; *Turner* v. *Rose*, 1 Ld. Ken. 393; or he may award that one of the parties shall pay to the other *costs to be taxed by the master; Winter* v. *Garlick*, 1 Salk. 75; 6 Mod. 195; *Pedley* v. *Goddard*, 7 T. R. 75; or he may award costs *generally*, in which case the master shall tax them: *Dudley* v. *Nettlefold*, 2 Str. 737; *Perry* v. *Nicholson*, Say. 240; *Fox* v. *Smith*, 2 Wils. 267; *Stephenson* v. *Browning*, Barnes, 56. And see Hullock on Costs, 418, 419; *Candler* v. *Fuller*, Willes, 62; Kyd on Awards, 394, 2nd ed.; 2 Tidd, 832, 9th ed. And when an arbitrator, authorized to tax costs in a cause, has allowed an item which it is insisted ought not to have been charged, the Court will not refer it to the master: *Anon.*, 1 Chitt. 38. But he cannot award that one of the parties shall pay to the other such costs as two persons named in the award, but not officers of the Court, shall appoint; for this is an improper delegation of his authority: *Knott* v. *Long*, Ca. t. Hardw. 181, Lee's Edit.; 2 Str. 1025. And where a special jury having been obtained on the motion of the defendant, the cause was referred; and by the order of reference, the costs of the cause were to abide the event, and the costs of the reference and of the special jury were left in the discretion of the arbitrator; it was held, that the arbitrator could not, after directing a verdict for the plaintiff, award that the latter should pay the costs of the special jury: *Finlayson* v. *M'Leod*, 1 B. & Al. 663. As to costs of an action in an inferior Court, see *Winter* v. *Garlick*, 1 Salk. 75; *Addison* v. *Gray*, 2 Wils. 293; *Hanson* v. *Liversedge*, 2 Vent. 242.

He cannot authorize any besides officers of the Court to ascertain the costs.

Costs of special jury.

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Where the costs of the cause and of a special jury are separately referred, the arbitrator must adjudicate distinctly as to each: *George* v. *Lousley*, 8 East, 13. See *Robinson* v. *Henderson*, 6 Mau. & S. 276.

Taxed costs must be as between party and party—when.

If, under a submission by rule of Court or order of Nisi Prius, an arbitrator award costs to be taxed by the master, such costs shall be taxed as between party and party, and not as between attorney and client: *Pratt* v. *Salt*, Ca. t. Hardw. 161. And it is settled, that an arbitrator cannot, in such a case, award any other than the common costs, as between party and party, unless he be expressly authorized so to do: *Marder* v. *Cox*, Cowp. 127; *Barker* v. *Tibson*, 2 W. Bl. 953; *Seccombe* v. *Babb*, 6 M. & W. 129. So, upon a submission by bond of all matters in difference between the parties in a *cause*, without making any mention of *costs*, the arbitrator has no authority to award costs as between attorney and client: *Whitehead* v. *Firth*, 12 East, 165. But when there is no cause depending, and the reference is entirely the act of the parties, as there can be no taxation by an officer of the Court, costs as between attorney and client may be awarded: *Hartnell* v. *Hill*, Forrest, 73, 79.

And if arbitrators award the defendant to pay the plaintiff his costs, to be taxed by the proper officer before a particular day, it is the business of the *defendant* to have them taxed before that day: *Candler* v. *Fuller*, Willes, 62; *Bigland* v. *Skelton*, 12 East, 436.

On referring a cause, the arbitrator may award costs *subsequent* to the order.

Under a submission to arbitration of two assaults, for one of which the defendant had been indicted and convicted at the quarter sessions, and of all costs incident to the indictment and subsequent proceedings thereon, the arbitrator having awarded a payment in satisfaction of all costs incident to the indictment, and previous as well as subsequent proceedings thereon, &c., it was held, that he had not thereby exceeded his authority: *Baker* v. *Townshend*, 7 Taun. 422, 424. And on a submission to arbitration under an order of Nisi Prius, the arbitrator may award costs *subsequent* to the order; but where the submission is by bond, he cannot award subsequent

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costs, unless power be expressly given him for that purpose: *Carpenter* v. *Joynes*, Pr. Reg. 45; *Tynte* v. *Every*, Barnes, 58; *Hartnell* v. *Hill*, Forrest, 78.

The general term *costs* does not include the costs of *reference*.

If an arbitrator appointed under an order of Nisi Prius only award costs to be taxed generally, the costs of the reference ought not to be allowed on the taxation, but merely the costs of the suit: *Bracher* v. *Cotton*, Barnes, 123; *Browne* v. *Marsden*, 1 H. Bl. 223. See *Wood* v. *O'Kelly*, 9 East, 436. Nor will the general term *costs*, in the rule of reference, include the costs in that reference: *Bradley* v. *Tunstow*, 1 Bos. & P. 34; 7 Taun. 213. Neither will an award that one party shall pay to the other the costs by him sustained in the action include the costs of the reference: *Browne* v. *Marsden*, 1 H. Bl. 223. Where a cause was referred in which a verdict had been found for the defendant, and a rule for a new trial obtained and the costs of the cause were to be in the discretion of the arbitrator, who awarded that the plaintiffs were entitled to recover, and that the defendants should pay the costs of the cause; it was held that the plaintiffs were not entitled to the costs of the first trial: *Rigby* v. *Okell*, 7 B. & C. 57. See *Elvin* v. *Drummond*, 1 Moo. & P. 88; *Lewis* v. *Harris*, 4 D. & R. 129.

What held to be costs in the cause.

Where the arbitrator directs the payment of the costs of the *award* generally, without fixing the amount of them, it seems the award is not bad in that respect for uncertainty, but that the amount may be taxed by the officer of the Court: *vide ante*, p. 70.

An arbitrator cannot, it seems, without authority, charge a certain sum for his own expenses: *George* v. *Lousley*, 8 East, 13. For it has been held, that the law raises no *implied* promise to pay an arbitrator for his trouble: *Virany* v. *Warne*, 4 Esp. 47. See also *Veitch* v. *Russell*, 3 Q. B. 928. But where there is an express promise to remunerate the arbitrator he may maintain an action: *Hoggins* v. *Gordon*, 3 Q. B. 466. And a clause in a submission providing for remuneration of the arbitrators is evidence of such promise: *Bates* v. *Townley*, 2 Ex. 152. See

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also *Hicks* v. *Richardson*, 1 Bos. & P. 93; *Burroughes* v. *Clarke*, 1 Dowl. 48. It is now the usual practice for the arbitrators to fix their own remuneration. If arbitrators award an excessive sum to be paid to themselves, the Court will refer it to the master to reduce the amount: *Miller* v. *Robe*, 3 Taun. 461; *Fitzgerald* v. *Graves*, 5 Taun. 342. The remuneration should not be stated in the award itself, but notice should be given to the parties of the amount so charged. See Russ. Arbitr., pp. 388, 494. The arbitrator has a lien on the submission and award, and any memoranda, &c. of his own, but not on documents put in as evidence by the parties, for payment of his reasonable charges: *Re Coombes*, 4 Ex. 839.

An arbitrator may employ a solicitor or counsel to draw up his award, and include the expenses in the costs of the award: *Threlfall* v. *Funshawe*, 19 L. J., Q. B., N. S. 334.

As to proving costs in bankruptcy.

The recent Bankruptcy Act has left untouched the law as to proving costs, where the bankruptcy ensues before judgment. Where a verdict was entered for a plaintiff subject to an award, and the arbitrator awarded the costs of the reference to be paid by the plaintiff, who after the verdict and before the award became bankrupt, it was held that neither these costs nor the costs of the cause (which were to abide the event) were provable under the commission, and consequently the bankrupt was not discharged from them by his certificate: *Haswell* v. *Thorogood*, 7 B. & C. 705. See *Jacobs* v. *Phillips*, 1 Cr., M. & R. 195.

Sum payable at a future time cannot be set off against costs immediately due.

Where an arbitrator directed a verdict to be entered for the plaintiff which carried costs, and directed a sum of money to be paid by the plaintiff to the defendant, within two months from the date of the award; it was held that the defendant was not entitled to set off this sum against the costs, the two months not having elapsed, but was bound to pay the costs immediately upon their being taxed: *Young* v. *Gye*, 10 Moo. 198. See *Little* v. *Newton*, 2 Scott, N. R. 509; *Hobdell* v. *Miller*, 2 Scott, N. R. 163.

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Errors in the award.

As to Errors in the Award.]—Though a Court of equity, where the only object of the bill was to set aside an award, would not permit the plaintiff to discuss legal objections to it, but confined him to those for partiality and corruption; yet it seems that if the bill, besides praying to set aside the award, prayed also for an account, he was permitted to make legal objections, in order to let in such an account. See *Champion* v. *Wenham*, 1 Ambl. 245.

Mistake in law.

If the arbitrators appear to be mistaken in a *doubtful* point of law, the award may be permitted to stand, though the Court should be of a different opinion. Per Lord *Hardwicke*, *Ridout* v. *Paine*, 3 Atk. 495.

Thus, in the case of *Ainsley* v. *Goff*, Kyd on Awards, 351, this rule was laid down by the Court of King's Bench :—That where the arbitrators, meaning to follow the law in their determination, happen to mistake it, this is a good reason for setting aside their award, so far as it is affected by that mistake; but where, knowing what the law is, or laying it entirely out of their consideration, they make what they conceive, under all the circumstances of the case, to be an equitable decision, it is no objection to the award that in some particular point it is manifestly against law. See also observations of *Wilde*, C. J., in *Fuller* v. *Fenwick*, 3 C. B. 705.

In *Ainsley* v. *Goff*, the Court directed an affidavit to be made by the arbitrators, explanatory of their intention; but it should be observed that in a subsequent case, where the terms of an award were clear upon the face of it, the Court refused to receive an affidavit by one of the arbitrators in explanation of their meaning: *Gordon* v. *Mitchell*, 3 Moo. 241. It is perfectly clear upon the general rules by which writings are construed, that any explanation of an award by the arbitrators is inadmissible, except to explain a latent ambiguity: *vide ante*, Vol. I., p. 369 *seq.* Evidence of circumstances attending the making of the award may be admitted, for the purpose of ascertaining its validity: *ante*, Vol. I., p. 347 *seq.* And if the arbitrator state matters which show that he has misconstrued the order of reference, and has

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thus, in forming his conclusion, exceeded his authority, the award may be set aside: *Jones* v. *Corry*, 7 Scott, 106.

Where the arbitrator professed to decide upon the law, and delivered in, together with the award, a paper, containing observations upon the evidence before him, together with his reasons for deciding as he had done, the Court set aside the award for a mistake in point of law; observing that the paper having been delivered under such circumstances, the statement of the arbitrator's reasons contained in it was to be considered in the same light as if it had appeared upon the face of the award itself; and as it was evident from thence, that the arbitrator had proceeded upon a ground unsupported by law, whereas he plainly intended to decide according to law, the award was not such as he intended it to be. So it seems it would be if such reasons appeared in any other authentic manner to the Court: *Kent* v. *Elstob*, 3 East, 18. And see *Aubert* v. *Maze*, 2 Bos. & P. 371. But in *Delver* v. *Barnes*, 1 Taun. 48, the Court of Common Pleas ruled, that it is not a sufficient ground for an application to set aside an award, on the face of which no objection appears, to state facts from which it may be inferred that an incorrect notion of the law of the case subsisted in the mind of the arbitrator. See also *Williams* v. *Jones*, 5 Man. & Ry. 3.

Mode of taking objection.

On an application for an attachment for non-performance of an award, it is competent to the parties *to object to the award*, for any illegality apparent on the face of it, though the time for applying to set it aside is expired; but the Court will not listen to *an application to set aside an award*, for any defect whatsoever, after the time limited by the statute 9 & 10 Will. 3, c. 15; *Pedley* v. *Goddard*, 7 T. R. 73; although such defect appear on the face of the award: *Lowndes* v. *Lowndes*, 1 East, 276. *Vide infra*, p. 188. This rule applies to all objections to awards: *Freame* v. *Pinneger*, 1 Cowp. 23.

And the Court will not set aside an award on the ground that the arbitrator was mistaken in law, unless the principles of law upon which he has

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decided appear on the face of the award: *Anon.*, 1 Chitt. 674. And where the law and fact are referred to an arbitrator, the award will not be set aside, unless there appear to be error in law on the face of it: *Doe* v. *Thompson*, 1 Chitt. 674, n; *Boutilier* v. *Thick*, 1 D. & R. 366. Where a cause involving a question of law was referred to a barrister, whose decision was questioned on the ground of a mistake in point of law on the construction of a contract between the parties; Lord *Ellenborough* said, that he feared it was impossible to lay down any general and certain rule upon this subject, in what cases the Court would not suffer an award to be opened; it must be subject to some degree of uncertainty, depending upon the circumstances of each case: *Chace* v. *Westmore*, 13 East, 357. Where two parties agreed to be bound by the opinion of a professional man, on the construction of an Act of Parliament, his opinion was considered as final and conclusive, though it recommended the printed statute to be compared with the parliament roll before the matter was settled, under a doubt whether the statute was not misprinted. For the opinion when given was in the nature of an award, and became final between them, and the Court would not look into it to see whether it was strictly right: *Price* v. *Hollis*, 1 Mau. & S. 107. So, where an action was referred that had been brought to determine whether certain fees were to be paid to the rector or to the vicar, and the arbitrator simply stated that they had been properly paid to the vicar, the Court refused to entertain the objection that the award was contrary to law, as the illegality did not appear on the face of the award: *Cramp* v. *Symons*, 7 Moo. 434; 1 Bing. 104. Again, where a motion was made for a rule to show cause why the award should not be referred back to the arbitrator, to strike out charges which he had improperly allowed (namely, an apothecary's charges for attendances), the Court refused the motion, observing that affidavits could not be received to show what particular charges had been allowed: *Gensham* v. *Germain*, 11 Moo. 1. See also *Price* v. *Jones*, 2 You. & J. 114; *Boutillier* v. *Thick*, 1 D. & R. 366; *Williams* v. *Jones*,

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5 Man. & Ry. 3; *Payne* v. *Massey*, 9 Moo. 666. In *Richardson* v. *Nourse*, 3 B. & Al. 237, *Holroyd*, J., said: "The Court will not set aside an award on the ground merely that an arbitrator is mistaken in point of law, but the Court must be clearly satisfied that he would not have made such an award if he had known what the law was."

If the arbitrator has any doubt as to the law, he may, if properly empowered by the submission, state a case for the opinion of the Court, and find in the alternative; but if, professing to find according to the law, he states facts and comes to a conclusion that is not warranted by the law, his award is bad: *Ames* v. *Milward*, 2 Moo. 713; 8 Taun. 637; *Re Webb*, 8 Taun. 443; 2 Moo. 500; *Aubert* v. *Maze*, 2 Bos. & P. 371. But where the matter in dispute was a matter of fact, and the arbitrator found for the plaintiff, and not being authorized to state a case for the opinion of the Court, directed that if the Court should be of opinion that he had not decided rightly on the law a nonsuit should be entered, the Court held the award binding in favour of the plaintiff: *Barrett* v. *Wilson*, 1 Cr., M. & R. 586; *Barton* v. *Ranson*, 3 M. & W. 322. When the arbitrator, having power to state points of law, did so, and overruled objections without stating the facts upon which they arose, the Court, being of opinion with him as to the law, held the award good: *Jay* v. *Byles*, 3 Moo. & Sc. 86. *Vide ante*, pp. 178 *seq.*

An arbitrator who has authority to take the opinion of the Court on points of law is not bound to do so: *Wood* v. *Hotham*, 5 M. & W. 674. If from one part of the award it appear that the arbitrator intended to leave a particular question of law open, the Court will consider it, although in another part he may have in terms decided it: *Sherry* v. *Oke*, 3 Dowl. 349.

There is no difference as to mistake of law between the award of a professional and that of a non-professional arbitrator, whether learned or unlearned; he is selected by the parties as their judge; and whether the question is of law or of fact he is authorized to decide it; *Jupp* v. *Grayson*, 1 Cr., M. & R. 523; *Ashton* v. *Poynter*, 3 Dowl. 201; *Perryman* v. *Steggall*, 3 Moo. & Sc. 93; *Huntig* v. *Ralling*, 8 Dowl. 879; *Fuller*

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v. *Fenwick*, 3 C. B. 705; and where one of the arbitrators is a lawyer and the other not, the latter cannot leave the decision of legal points to the former: *Little* v. *Newton*, 2 Scott, N. R. 509.

Mistake on the evidence.

It seems that the improper rejection of evidence is a ground for impeaching an award. See *Morgan* v. *Mather*, 2 Ves. jun. 15; *Anderson* v. *Darcy*, 18 Ves. 447. See *Kingwell* v. *Elliott*, 7 Dowl. 423, and *ante*, p. 144, as to the improper reception of evidence; and as to false evidence, see *Pilmore* v. *Hood*, 8 Scott, 180. And so would be a clearly admitted mistake as to the facts. See *Re Hare*, 8 Scott, 367. Though the arbitrator must not decide without evidence, yet if there is evidence which would be sufficient to warrant the Court in leaving the facts to the jury, the Court will not interfere. The Courts have a control over juries as to matter of fact which they exercise when the conclusion is manifestly wrong. They have no such control over an arbitrator as to facts; and they will not set aside the award, though the facts stated on the face of it are manifestly insufficient to support the conclusion: *Barrett* v. *Wilson*, 1 Cr., M. & R. 586; *Price* v. *Price*, 9 Dowl. 334; *Arthur* v. *Owen*, 5 Jur. 340.

An award cannot be disturbed for mistake, upon a question of law referred.

Courts of equity seem generally to have been inclined to go farther than Courts of law in supporting an award, where a question of law only was referred: *Ching* v. *Ching*, 6 Ves. 282; *Kent* v. *Elstob*, 3 East, 18; *Young* v. *Walter*, 9 Ves. 364. In the Exchequer, a cause was referred from the assizes to the award of a barrister, who rejected a witness as inadmissible in point of law; although the point of law was doubtful, yet the Court held, that as everything, both of law and fact, must, in this instance, have been referred to the arbitrator, a person of competent judgment to decide, they would not disturb the award: *Campbell* v. *Twemlow*, 1 Price, 81. In *Steff* v. *Andrews*, 2 Madd. 6, Sir *Thomas Plumer*, V.-C., held, that if a point of law be referred to the decision of an arbitrator, the parties are bound by his decision, whether right or wrong; unless fraud or corruption is imputable. See to the same effect, *Wood* v. *Griffith*, 1 Swanst. 55. See also *Elvin* v. *Drummond*, 1 Moo. & P. 88; *Wilson* v. *King*, 2 Cr. &

M. 689; *Wade* v. *Malpas*, 2 Dowl. 638; *Armstrong* v. *Marshall*, 4 Dowl. 593; *Ashton* v. *Pointer*, 3 Dowl. 201; *Gensham* v. *Germain*, 11 Moo. 1.

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An arbitrator is not bound by a rule of practice adopted by the Court for general convenience; and, therefore, where, on a reference of a Chancery suit, and all matters in difference between the parties, the arbitrator had allowed interest (when it would not be allowed by a Court of law or equity), the Court refused to set aside the award on that ground: *In re Badger*, 2 B. & Al. 693. See *Morgan* v. *Mather*, 2 Ves. jun. 15.

An arbitrator is not bound by a rule of practice adopted by Courts of law or equity.

However, it is certainly clear, that no Court will permit directions in an award to stand, which are so contrary to the common rules of law, that the party, by his observance of them, would become a trespasser on the rights of others: 1 Roll. Abr. 249 (G); *Ashton's Case*, 1 Roll. Abr. 249, pl. 10; *Lynsey* v. *Ashton*, 1 Roll. Abr. 247 (E), pl. 2; Godb. 255; *Alder* v. *Savill*, 5 Taun. 454; Caldwell, 59. And where an arbitrator awarded a sum of money to one party, and having stated in his award the grounds on which he conceived it to be due, it appeared that part arose out of a transaction which, though the arbitrator did not seem to be aware that it was illegal, yet the Court determined it to be so, and set the award aside for so much: *Aubert* v. *Maze*, 2 Bos. & P. 371. But if an arbitrator chooses to put the law out of the question, and to award the payment of a conscientious demand, arising out of a transaction which he knows to be illegal, he may do so, if the fact do not appear on the face of the award: *Delver* v. *Barnes*, 1 Taun. 48. And although an arbitrator, on a question of mixed law and fact, had allowed transactions apparently illegal, as premiums of insurance on a voyage to a hostile port, the Court of Common Pleas refused, on that account, to set aside the award: *Wohlenberg* v. *Lageman*, 6 Taun. 251.

Award of illegal matter.

8. Of setting aside Awards.

Formerly where the submission was by bond, or other writing, or by parol, the award could not be

How award set aside.

Setting aside Awards.

in any manner set aside at common law, for the misbehaviour of the arbitrators, but the remedy was by bill in equity: *Veale* v. *Warner*, 1 Saund. 327; *Earl* v. *Stocker*, 2 Vern. 251. But where the submission was by rule of Court, the conduct of the arbitrators, and of the parties to the submission might, as it still may, be examined into; and if it appeared that the arbitrators had been partial, or unjust, or had mistaken the law, the Court would not enforce a performance of the award: *Anon.*, 1 Salk. 71, pl. 4; *Morris* v. *Reynolds*, and *Davila* v. *Almanza*, 1 Salk. 73; *Forster* v. *Brunetti*, 1 Salk. 83; *Derbyshire* v. *Cannon*, 1 Mod. 21; *Lucas* v. *Wilson*, 2 Burr. 701. If, however, the conduct of the arbitrators was not or could not be successfully impeached, the Court of King's Bench, in the reign of Charles II., when Kelynge was Chief Justice, began to compel a performance of the award by attachment, as for a contempt of a rule of Court: *Forster* v. *Brunetti*, 1 Salk. 83. It afterwards became the common practice to issue out an attachment for non-performance of an award. But the conduct of the arbitrators forms no ground for resisting a motion for an attachment, which can only be done for some defect apparent on the award itself: *Holland* v. *Brooks*, 6 T. R. 161; *Braddick* v. *Thompson*, 8 East, 344; *Brazier* v. *Bryant*, 10 Moo. 587; *M'Arthur* v. *Campbell*, 4 Nev. & M. 208. In order to impeach an award for partial, corrupt, or improper conduct of the arbitrators, application should be made to the Court to set it aside.

Attachment for non-performance, when refused.

Setting award aside under 9 & 10 Will. 3, c. 15.

The stat. 9 & 10 Will. 3, c. 15 (stated *ante*, p. 101), authorizes the Court (*a*) in which the rule for submission to arbitration was made, to set aside any arbitration or umpirage procured by corruption or undue means, upon complaint made before the last day of the next term after such arbitration or

(*a*) An application to set aside an award must now be made in that Division of the High Court of Justice in which the submission has been made a rule of Court: *Re Lomax's Arbitration*, 42 L. T., N. S. 391. The application is to be made by motion, and the notice of motion must particularize the grounds of objection: *Mercier* v. *Pepperel*, 19 Ch. D. 58.

umpirage made and published to the parties. The Court cannot *set aside* an award made upon a private reference on any other ground than that mentioned in the Act, namely, fraud or corruption in the arbitrators; *Anderson* v. *Coxeter*, 1 Str. 301; and they cannot set aside an award under a private reference which contains no agreement that it shall be made a rule of Court at all: *Ansell* v. *Evans*, 7 T. R. 1; *Godfrey* v. *Wade*, 6 Moo. 488, *ante*, pp. 100 *seq.* The reference must be made a rule of Court before motion to set it aside: *Reynolds* v. *Askew*, 5 Dowl. 682. If there is any illegality or defect on the face of the award, the Court will refuse to interfere by attachment, and will leave the party to make what he can of the award by action on it, or on the bond or agreement of submission: *Hutchins* v. *Hutchins*, Andr. 297; *Hales* v. *Taylor*, 2 Str. 695; *Pedley* v. *Goddard*, 7 T. R. 73. And when there is any doubt as to the validity of an award, the Court will pursue the same course: *Richardson* v. *Nourse*, 3 B. & Al. 237; *Burley* v. *Stevens*, 4 Dowl. 770. **Setting aside Awards.**

Previously to the statute 9 & 10 Will. 3, c. 15, the Courts exercised the jurisdiction of setting aside awards made in pursuance of references by rule of Court or order at Nisi Prius, and that not only for misconduct of the arbitrators, but for any objection to the award itself: *Anon.*, 1 Salk. 71, pl. 4; *Lucas* v. *Wilson*, 2 Burr. 701; *Synge* v. *Jervoise*, 8 East, 466. And the statute does not interfere with the power of the Courts as to such references, although they will generally regulate the exercise of their discretion with reference to the rule prescribed by the Act, and will not, except upon special grounds, interfere after the time mentioned in the Act: *ante*, p. 104; *infra*, p. 189. Where the submission to arbitration is made a rule of Court pursuant to the statute, though no motion can be made to set aside the award for extrinsic matter, that is, for fraud or corruption in the arbitrator, after the time limited by the Act, or for objections appearing on the face of it; see *Lowndes* v. *Lowndes*, 1 East, 276; *Sell* v. *Carter*, 2 Dowl. 245; *Reynolds* v. *Askew*, 5 Dowl. 682; yet an

Setting aside awards independently of the 9 & 10 Will. 3, c. 15.

Time for taking objections.

Setting aside Awards.

application for an attachment for not performing the award, may be resisted at any time for defects appearing on the face of the award itself: *Pedley* v. *Goddard*, 7 T. R. 73, where the case of *Hutchins* v. *Hutchins*, Andr. 297, is recognized. And in neither case, whether the submission be originally by rule of Court or by bond, afterwards made a rule of Court, will the Court enter into the merits of the award and examine into the reasonableness and justice of it; *Lucas* v. *Wilson*, 2 Burr. 701; unless it appears manifestly from the merits that the arbitrators have acted dishonestly and corruptly.

Party, how precluded from objecting to award.

A party, by accepting the costs of the reference and award, precludes himself from moving to set it aside: *Kennard* v. *Harris*, 2 B. & C. 801 (*b*). And where, subsequently to the expiration of the arbitrator's authority, the attorney of one of the parties wrote a letter to the arbitrator, urging him to reconsider some points connected with the reference, which he refused, it was held that the party was precluded from taking any objection, on the ground of the power of the arbitrator having expired: *Rex* v. *Hill*, 7 Price, 636.

So, where the parties to a reference submit to be examined by an umpire chosen by arbitrators, they cannot afterwards object to the want of authority in the arbitrators to choose an umpire: *Matson* v. *Trower*, 1 Ry. & M. 17. See *Hewlett* v. *Laycock*, 2 Car. & P. 574; *Kingwell* v. *Elliott*, 7 Dowl. 423, and *ante*, pp. 137, 150. Where the award directed the defendant to pay to the plaintiff a sum of money, and the plaintiff to lay out a sum on the premises which the defendant held of him, the defendant's not giving notice to the plaintiff of his intention to apply to set aside the award, after he knew that the plaintiff had commenced the repairs, was held not to be a waiver of the right to object to the award: *Hayward* v. *Phillips*, 6 A. & E. 119.

An award will not be set aside for a mistake at

(*b*) As to taxing the costs within the time for applying to set the award aside, see *Little* v. *Newton*, 2 Scott, N. R. 159; *Hobdell* v. *Miller*, 2 Scott, N. R. 163.

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the instance of the party in whose favour the mistake is made: *Moore* v. *Butlin*, 2 Nev. & P. 436.

Reference back to the arbitrator on ground of new evidence.

In order that an award may be set aside, the fact that fresh evidence has been discovered after the award was made is not sufficient; it must be shown by affidavit that there was some surprise, and that it was not such evidence as a reasonable man might anticipate, and that it was such evidence as reasonable diligence could not have obtained: *Eardly* v. *Otley*, 2 Chitt. 42.

Mistake.

Where counsel moved to set aside an award in favour of his own client, on an affidavit of acknowledgment by the arbitrator and defendant, that a considerable sum had been by mistake omitted to be awarded to his client, the Court of King's Bench granted a rule *nisi*: *Anon.*, 2 Chitt. 44. And see *Henfree* v. *Bromley*, 6 East, 309. In *Rogers* v. *Dallimore*, 6 Taun. 115, the Court of Common Pleas, in a case similarly circumstanced, held, that a rule absolute might be pronounced either to set aside the award, or to send back the case to the same arbitrator, or to amend the award by altering it to the enlarged sum.

Time for moving on ground of mistake.

But, in ordinary cases, an application for either of these purposes must, it seems, even where the submission is by rule of Court in an action pending, be made within the time limited by the statute: *Rogers* v. *Dallimore*, 6 Taun. 114. *Vide ante*, pp. 104, 185. In *Zachary* v. *Shepherd*, 2 T. R. 781, where a cause had been referred, the Court held, that a motion that an award should be referred back to the same arbitrator to reconsider it, on the ground that he had not sufficient materials before him at that time, must be made before the last day of the next term after such award made, according to 9 & 10 Will. 3, c. 15, s. 2, although the arbitrator be not charged with corruption or undue means. But the Court has set aside an award founded on a submission by rule of Court in an action pending, where there has been a plain mistake of the arbitrator, and the counsel for the plaintiff was instructed to move sooner, but from some circumstance he did not, although the applica-

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tion be not made in the term next after the making of the award: *Rogers* v. *Dallimore*, *infra*. For the statute extends only to cases where the submission is by bond, or a written agreement of the parties; *Anderson* v. *Coxeter*, 1 Str. 301; *Dubois* v. *Medlycott*, Barnes, 55; *Synge* v. *Jervoise*, 8 East, 466; *Ansell* v. *Evans*, 7 T. R. 1; the distinction being between cases where the reference is entered into by the original agreement of the parties—the Court not being in possession of any cause between them—in which case the Court could not interfere, except under the statute, and those cases where the aid of the statute is not necessary to give the Court authority: *Rogers* v. *Dallimore*, 1 Marsh. 471. For instance, the statute does not apply to awards made under the authority of a rule of Court made in an action pending. For those awards under orders of Nisi Prius, or of a judge at chambers, derive their authority only from the retrospective operation of the rule of Court which is afterwards made, and therefore they are awards under rules of Court: 6 Taunt. 114. Strictly speaking, therefore, it is an inaccurate expression to say that an award is made under a judge's order; for in fact it is to the subsequent rule of Court that it owes all its authority. And no order of a judge, whether made at Nisi Prius, or at chambers, is a ground for an attachment, unless made a rule of Court.

Orders of reference at Nisi Prius, or of a Judge at Chambers, derive their authority from the subsequent rule of Court;

and they are no ground for attachment, unless made a rule of Court.

Time for moving to set aside.

The time for moving to set aside an award under the statute 9 & 10 Will. 3, c. 15, s. 2, is *before* the last day of the term next after the award is made and published to the parties, *i. e.* if the award is made in vacation, then the next term; and if it is made in term time, then the next term (*c*): *In re*

(*c*) By sect. 26 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), terms were abolished for most purposes connected with the administration of justice; but in *Christ's College, Brecknock* v. *Martin*, 13 Q. B. D. 16, it was held that terms still existed as measures for determining the times within which awards might be set aside. Now, however, by Ord. LXIV. r. 4, "An application to set aside an award may be made at any time before the last day of the sittings next after such award has been made and published to the parties." As to appeals from awards on compulsory reference, see Ord. LIX. r. 3.

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Burt, 5 B. & C. 668; *Allenby* v. *Proudlock*, 4 Dowl. 54; *Reynolds* v. *Askew*, 5 Dowl. 682. No application can be heard on the last day of the term: *Freame* v. *Pinneger*, 1 Cowp. 23; 1 Tidd. 9th ed. 498. The award is published when notice is given to the parties that it is made, and that they may have it on payment of *fair* and *reasonable* charges; *Musselbrook* v. *Dunkin*, 1 Dowl. 722; 2 Moo. & Sc. 740; or, according to the case of *M'Arthur* v. *Campbell*, 2 Nev. & M. 444; 5 B. & Ad. 518, whether the charges are reasonable or not. See also *Brooke* v. *Mitchell*, 8 Dowl. 392. Where the award, being in the hands of the successful party, could not be procured in time, the Court, on motion, enlarged the time until the following term: *In re Perring*, 3 Dowl. 98. But see *Reynolds* v. *Askew*, 5 Dowl. 682; *In re Smith* v. *Blake*, 8 Dowl. 133; 2 Jur. 1015.

Where a cause and all matters in difference were referred by order of Nisi Prius, and the arbitrator directed that a verdict should be entered for the plaintiff for 254*l.*; and then, setting forth facts which raised a question for the Court, directed, that if, upon such facts, the Court should be of opinion that the verdict should be for 125*l.* only, then the damages should be reduced to that sum; it was held, that an application to enter the verdict for the smaller sum was, in effect, an application to set aside the award, which required to be made within the term next following the award: *Anderson* v. *Fuller*, 4 M. & W. 470.

It has been already observed, that the rule laid down by the statute has been adopted by the Courts, where the reference is by rule of Court, or by order of Nisi Prius; provided, in the latter case, that the reference is of other matters in difference besides the cause: *ante*, p. 185; *M'Arthur* v. *Campbell*, 2 Nev. & M. 444; *Rushworth* v. *Barron*, 3 Dowl. 317; *Hayward* v. *Phillips*, 1 Nev. & P. 288; *Moore* v. *Butlin*, 2 Nev. & P. 436; *Brooke* v. *Mitchell*, 8 Dowl. 392. But where the cause only is referred by order of Nisi Prius, and a verdict is taken, the arbitrator is put in place of the jury, and the application must,

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in most cases, be made within the time for moving in arrest of judgment, or for a new trial, that is, within the first four days of the next term: *Borrowdale* v. *Hitchener*, 3 Bos. & P. 244; *Rawsthorn* v. *Arnold*, 6 B. & C. 629; *Bennett* v. *Skardon*, 5 Man. & R. 10; *Thompson* v. *Jennings*, 10 Moo. 110; *Sell* v. *Carter*, 2 Dowl. 245; *Lyng* v. *Sutton*, 3 Scott, 187. See *Martin* v. *Burge*, 6 Nev. & M. 201; *Moore* v. *Butlin*, 2 Nev. & P. 436; *Brooke* v. *Mitchell*, 8 Dowl. 392.

By the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), sect. 9, it is enacted that:—

"All applications to set aside any award made on a compulsory reference under this Act shall and may be made within the first seven days of the term next following the publication of the award to the parties, whether in vacation or in term; and if no such application is made, or if no rule is granted thereon, or if any rule granted thereon is afterwards discharged, such award shall be final between the parties."

The Court will, upon sufficient grounds, admit an application, after the regular time has expired: *Sherry* v. *Oke*, 3 Dowl. 349; *Reynolds* v. *Askew*, 5 Dowl. 682; *Potter* v. *Newman*, 2 Cr., M. & R. 742; *Worrall* v. *Deane*, 2 Dowl. 261; *Hobbs* v. *Ferrars*, 8 Dowl. 779.

Rule discharged with costs on a frivolous application.

If a motion for setting aside an award be made on slight grounds, the rule will be discharged with costs: *Snook* v. *Hellyer*, 2 Chitt. 43.

Objections intended to be insisted on must be stated in the notice of motion.

The Rules of the Supreme Court, 1883 (Ord. LII. r. 4), provide that every notice of motion *to set aside*, remit, or enforce an award, shall state in general terms the grounds of the application: see *Mercier* v. *Pepperell*, 19 Ch. D. 58: and where any such motion is founded on evidence by affidavit, a copy of any affidavit intended to be used is to be served with the notice of motion. Formerly the several objections to the award, intended to be insisted upon at the time of moving to make the rule to set aside absolute, must have been stated in the rule to show cause. See *Dicas* v. *Jay*, 5 Bing. 281; *Carmichael* v. *Houchen*, 3 Nev. & M. 203; *Boodle* v. *Davis*, 4 Nev. & M. 788; *Allenby* v. *Proudlock*, 4

Dowl. 54; *Gray* v. *Leaf*, 8 Dowl. 654. No application for a rule nisi to set aside, remit or enforce an award is now necessary. See Ord. LII. r. 2. Performance of Awards.

9. Performance of Awards.

Effect of Award.]—Although an award cannot have the operation of conveying land; see 1 Roll. Abr. 270; *Marks* v. *Marriott*, 1 Ld. Raym. 115; yet, as a defendant may conclude himself by his own agreement from disputing the title of the lessor in ejectment, an award under a submission to arbitration will give a good title on which to maintain an ejectment: *Doe* d. *Morris* v. *Rosser*, 3 East, 15; *Smalley* v. *Blackburn Rail. Co.*, 2 H. & N. 158. Award may conclude a party from disputing the lessor's title in an action of ejectment.

By the 16th section of the Common Law Procedure Act, 1854, an order of the Court for delivery of possession pursuant to an award is equivalent to a judgment in ejectment. The section is as follows:—

"When any award made on any such submission, document, or order of reference as aforesaid directs that possession of any lands or tenements capable of being the subject of an action of ejectment shall be delivered to any party, either forthwith or at any future time, or that any such party is entitled to the possession of any such lands or tenements, it shall be lawful for the Court of which the document authorizing the reference is or is made a rule or order to order any party to the reference who shall be in possession of any such lands or tenements, or any person in possession of the same claiming under or put in possession by him since the making of the document authorizing the reference, to deliver possession of the same to the party entitled thereto, pursuant to the award, and such rule or order to deliver possession shall have the effect of a judgment in ejectment against every such party or person named in it, and execution may issue, and possession shall be delivered by the sheriff as on a judgment in ejectment." Rule to deliver possession of land pursuant to award to be enforced as a judgment in ejectment.

An award does not transfer a personal chattel. An award ordered that a tenant should deliver to his landlord a stack of hay upon the premises, at a certain price to be paid for it by the landlord; the Trover cannot be brought on an award *per se*.

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tenant refused to accept the money tendered, and to deliver the hay; upon which the landlord brought an action of trover for it: the Court held the action not maintainable, saying, that the remedy lay upon the award or the submission; but that, if the tenant had accepted the money tendered, such acceptance would have been a ratification of the award, and an assent on his part to the transfer of the property; without that it could not be transferred by the mere force of the award: *Hunter* v. *Rice*, 15 East, 100. See *Gunton* v. *Nurse*, 5 Moo. 259. So, an award that the tenancy between A. and B. should cease, and possession be delivered to A., was held not to change the property in the crops, as against a subsequent execution creditor of B.: *Thorpe* v. *Eyre*, 1 A. & E. 926.

Debt on award.

An award of payment of money creates a debt, which carries interest; *Johnson* v. *Durant*, 4 Car. & P. 327; but payment of interest is not enforceable by attachment; *Churcher* v. *Stringer*, 2 B. & Ad. 777. See *Lee* v. *Lingard*, 1 East, 401; and if the award or submission is not patently defective, the debt is good for the purpose of a creditor's petition and of being proved in bankruptcy: *Beeston* v. *White*, 7 Price, 209; *Antram* v. *Chase*, 15 East, 209.

The mode of enforcing an award.

Where a matter in dispute has been referred to arbitration by order of the Court, the award may be made a rule of Court: *Mercier* v. *Pepperell*, 19 Ch. D. at p. 60. An award which has itself been made a rule of Court, or which is made on a submission which has been made a rule of Court, may be enforced by peremptory order; *Jones* v. *Jones*, 14 Ch. D. 593; or by attachment: *Forster* v. *Brunetti*, 1 Salk. 83; *Hicks* v. *Richardson*, 1 Bos. & P. 93; *Dodington* v. *Hudson*, 8 Moo. 510: and if a verdict has been taken for the plaintiff's security, by entering up judgment thereon, and taking out execution; 2 Tidd's Prac. 833, 9th ed.; *Maggs* v. *Yorstan*, 6 Dowl. 481. Execution cannot be taken out upon the award under the stat. 1 & 2 Vict. c. 110, s. 18, although the submission is made a rule of Court: *Jones* v. *Williams*, 11 A. & E. 175. Where neither the award nor the submission can be made a rule of Court, the

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mode of enforcing the award by the party in whose favour it is made is by action.

If the award is lost, there must be an affidavit of its contents.

Upon an affidavit that the original award was lost, the Court granted a rule for an attachment *nisi* on a copy of it: *Robinson* v. *Davis*, 1 Str. 526. So, if an award be lost, the Court will, nevertheless, permit judgment to be entered accordingly upon an affidavit of its contents: *Hill* v. *Townsend*, 3 Taun. 45. In this case the original draft of the award was annexed to the affidavit. So, if the submission be lost, or is detained by the arbitrator, a copy of it may be made a rule of Court: *Thomas* v. *Philby*, 2 Dowl. 145. In an action to enforce the performance of an award, the submission by all the parties interested, unless admitted, must be shown. And if the submission is by bond, or other deed or agreement in writing, the execution of the document by all parties thereto must be proved by the plaintiff: *Dilley* v. *Polhill*, 2 Str. 923; *Antram* v. *Chase*, 15 East, 209; *Biddell* v. *Dowse*, 6 B. & C. 255; *Ferrer* v. *Oven*, 7 B. & C. 427.

Before award is enforced, submission must be made a rule of Court.

When and how done.

Before any application is made for an attachment, *Owen* v. *Hurd*, 2 T. R. 643; *Mayor of Bath* v. *Pinch*, 4 Scott, 299, or to set aside an award, *Harrison* v. *Grundy*, 2 Str. 1178; *Chicot* v. *Lequesne*, 2 Ves. sen. 316, the submission must be made a rule of Court, if not one already; which is done on an affidavit by one of the witnesses of the due execution of the bond or agreement containing the submission; and if he refuse to make it, the Court will compel him; for every witness does, by his signing, undertake to prove it when required: *Clark* v. *Elwick*, 1 Str. 1; 10 Mod. 332; Barnes, 58; *Weston* v. *Faulkner*, 1 Price, 308; 2 Tidd's Pract. 836, 9th ed.

When a reference to arbitration has been made under an agreement, the submission should be made a rule of Court, according to the common law practice before the Judicature Acts: *Jones* v. *Jones*, 14 Ch. D. 593 (*c*).

(*c*) The practice of the Court of Chancery was to make the award a rule of Court in such cases: *Cudlip* v. *Smedley*, 12 W. R. 200; 9 L. T., N. S. 476.

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The submission may be made a rule of Court, either before or after the award is made: *Alardes* v. *Cambel*, 1 Barnard. 152; *Chicot* v. *Lequesne*, 2 Ves. sen. 317; *Pownall* v. *King*, 6 Ves. 10; *Fetherstone* v. *Cooper*, 9 Ves. 67; *Smith* v. *Symes*, 5 Madd. 74; *Heming* v. *Swinnerton*, 16 L. J., Ch. 287. But where the matter is referred to arbitrators by rule of Court, and they make their award, the Courts will compel a performance of it as much as if the award were part of the rule; so that a new rule is needless: *Anon.*, 1 Salk. 71. Any enlargement of the time must be made a rule of Court: *Dickins* v. *Jarvis*, 5 B. & C. 528; *Barton* v. *Ranson*, 3 M. & W. 322. And several enlargements, whether by the parties or by orders of different judges, may be included in one rule: *Re Tribe and Upperton*, 3 A. & E. 295.

On application for attachment, the affidavit must state the time of the execution, &c.

Where the arbitrators have power to enlarge the time for making their award, and have enlarged it, and make their award in the additional time, in order to bring the defendant into contempt for non-performance of the award, there must be an affidavit that the time has been enlarged, that the award was made within the enlarged time, and that the defendant has been previously served with notice of those facts. See *Hilton* v. *Hopwood*, 1 Marsh, 66. And where the time has been enlarged by a judge's order, it should be shown that such order was made by consent: *Halden* v. *Glasscock*, 5 B. & C. 390. But where the arbitrator had power to enlarge the time for making his award by endorsement on the order of reference, and the order with two such endorsements was made a rule of Court, it was held not to be necessary to state in the affidavit upon which the application for an attachment was grounded, that the time had been duly enlarged by the arbitrator, as the Court must be presumed to have had a proper affidavit of the fact in granting the rule: *Dickins* v. *Jarvis*, 5 B. & C. 528; *Re Smith and Reeves*, 5 Dowl. 513; *Barton* v. *Ranson*, 3 M. & W. 322. And, it seems, that the affidavit for an attachment for non-performance of an award must, contrary to the usual practice, always state the time of the execution of the award: *Wohlenberg* v. *Lageman*, 6 Taun. 251. As to enlargement, *vide ante*, p. 147.

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When contradictory affidavits are produced in support of and in showing cause against the rule for an attachment, the Court will leave the party to his action: *Hales* v. *Taylor*, 2 Str. 695. See *Russell* v. *Yorke*, 4 Scott, 422.

Attachment not granted pending action.

Upon a submission being made a rule of Court, it was formerly holden that the party might proceed both by action and attachment at the same time: *Clarke* v. *Elwick*, 10 Mod. 332; *Anon.*, 1 Salk. 73; but a different doctrine has since been laid down: *Stock* v. *De Smith*, Ca. t. Hardw. 106; *Anon.*, Andr. 299. And accordingly, in *Badly* v. *Loveday*, 1 Bos. & P. 81; 2 Tidd, 833, 9th ed., the Court refused to grant an attachment for non-performance of an award, pending an action brought upon it, or to allow the plaintiff to waive the action in order to apply for an attachment. See *Higgins* v. *Willes*, 3 Man. & Ry. 382; *Paull* v. *Paull*, 2 Dowl. 340; 2 Cr. & M. 235. For the party has made his election, and he can have no better remedy upon the attachment than by action. See *Earl of Lonsdale* v. *Whinnay*, 1 Cr., M. & R. 591. But where the attachment is first resorted to, it does not debar the party from bringing an action, the greater and more beneficial remedy: *Paterson* v. *Gross*, 2 Barnard. 227. The two remedies in these cases have but one object, that of enforcing obedience to the award. The proceeding by action is a matter of right, while the proceeding by attachment depends on the discretion of the Court: *Stock* v. *De Smith*, Ca. t. Hardw. 106; *Hutchins* v. *Hutchins*, Andr. 297. And although the defendant be in custody on an attachment for non-payment of money awarded, the Court will not stay proceedings in an action of debt on the bond or on the award; for if the defendant die in execution on the attachment that execution is at an end, and cannot be revived by *scire facias* against his heirs or executors to enforce the payment; because the statute says that the attachment shall be prosecuted as in the case of a contempt in these cases; and a contempt not being in the nature of a judgment, a decree dies with the person, and cannot be prosecuted against his representatives: *Webster* v. *Bishop*, Pr. Ch. 223; 2 Vern.

Action may be brought after attachment.

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444. But if the defendant die in execution on a judgment, the plaintiff may still have an execution against his goods: *Paterson* v. *Gross*, 2 Barnard. 227. However, if the defendant be taken in execution on the judgment, the attachment will be discharged: *Richardson* v. *Chancey*, 1 Barnard. 386; *Stock* v. *De Smith*, Ca. t. Hardw. 106; Kyd on Awards, 315; Caldwell, 153; 1 Gwill. Bac. Abr. 237. An executor may have an attachment upon an award made in favour of his testator: *Rogers* v. *Stanton*, 7 Taun. 575. But see *R.* v. *Maffey*, 1 Dowl. 538.

Attachment against party out of the jurisdiction.

It is no objection to the issuing of an attachment, that the party resides out of the jurisdiction of the Court, for the Court will not inquire whether the circumstances under which the application is made are such that it can be executed with effect: *Hopcraft* v. *Fermor*, 8 Moo. 424; 1 Bing. 378.

Against whom attachment will not issue.

Trustees, or executors, or administrators, are not liable to an attachment for non-performance of an award, upon a submission by their *cestuis que trust*, testators or intestates; *Newton* v. *Walker*, Willes, 315; *Doe* d. *Pain* v. *Grundy*, 1 B. & C. 1284; but it is otherwise if an executor has executed the submission: *Spivy* v. *Webster*, 2 Dowl. 46. No writ of attachment will issue against a peer of the realm, or a member of the House of Commons: *Walker* v. *Earl Grosvenor*, 7 T. R. 171; *Catmur* v. *Knatchbull*, 7 T. R. 448; or against a corporation aggregate: *Guilford* v. *Mills*, 2 Keb. 1; or an officer of a joint stock company: *Corpe* v. *Glyn*, 3 B. & Ad. 801.

When attachment will not be granted.

Where payment is directed to be made to a stranger, an attachment will not be granted on the application of the stranger: *In re Skeete*, 7 Dowl. 618.

An attachment cannot be obtained for non-performance of an act that is consequential upon the award, unless the award distinctly directs that the act shall be done: *Edgell* v. *Dallimore*, 11 Moo. 541; *Thornton* v. *Hornby*, 1 Moo. & Sc. 48; *Hopkins* v. *Davies*, 1 Cr. M. & R. 846; *Scott* v. *Williams*, 3 Dowl. 508; *Seaward* v. *Howey*, 7 Dowl. 318. An order that a verdict shall be entered for a certain sum, made without authority, does not amount to a direction to pay: *Donlan* v. *Brett*, 4 Nev. & M. 854.

Performance of Awards.

Demand of payment to ground an attachment on may be made after the appointed day has expired: *In re Craike*, 7 Dowl. 603. But any great delay (as four years) in applying for an attachment, must be satisfactorily explained by affidavit: *Storey* v. *Garry*, 8 Dowl. 299. But some demand is necessary, although a time and place for performance are appointed: *Brandon* v. *Brandon*, 1 Bos. & P. 394. As to a demand by attorney or agent, see *Bass* v. *Maitland*, 8 Moo. 44; *Kenyon* v. *Grayson*, 2 Smith, 61; *Jackson* v. *Clarke*, M'Clel. 72; *Laugher* v. *Laugher*, 1 Cr. & J. 398; *King* v. *Packwood*, 2 Dowl. 570; *Inman* v. *Hill*, 4 M. & W. 7; *Doe* d. *Hickman* v. *Hickman*, 1 Scott, N. R. 398. If more is demanded than the award authorizes, no attachment can issue upon the refusal: *Strutt* v. *Rogers*, 7 Taun. 213.

Demand of performance.

An award, directing an instrument to be executed, should always state at whose expense it is to be prepared, as this is a source of much dispute.

Where an arbitrator awarded that B. (the vendee), should perform his contract with A. (the vendor), upon A. conveying to him a good title, it was held to be necessary for A., in moving for an attachment, to show that he had tendered a conveyance: *Standly* v. *Hemington*, 2 Marsh. 276; 6 Taun. 561. But it should seem that if the conveyance was to be prepared at the expense of the vendee (according to the general rule, *vide* Sugd. Vend., p. 201, 13th ed., and there seems to have been nothing to take this case out of the rule), it would be incumbent on *him* to tender the conveyance. See *Doe* d. *Clarke* v. *Stillwell*, 8 A. & E. 645.

Whether vendor bound to tender a conveyance.

A defect apparent on the face of the award may be taken advantage of, to invalidate a judgment and execution, as well as to prevent an attachment, though after the time for setting aside the award: *Pedley* v. *Goddard*, 7 T. R. 73. So, also, where the validity of an award is doubtful: *Dickenson* v. *Allsop*, 13 M. & W. 722; *Spooner* v. *Payne*, 11 Jur. 242; or where the performance of the award is legally impossible: *Re Dodington and Bailward*, 7 Scott, 733; or where there is a *bonâ fide* counter-claim not subject to the reference: *Swayne* v. *White*, 31 L. J., Q. B. 260.

Remedy against execution, &c., on defective award.

Performance of Awards.

Although the arbitrator states particular facts or conclusions in his award, which are not sufficient to support it; yet, unless he state that his decision was founded on what he has so stated, it will not be set aside. He may have had a particular reason for stating them: *Lancaster* v. *Hemington*, 4 A. & E. 345. See *Jones* v. *Corry*, 7 Scott, 106; 7 Dowl. 299. See, further, *ante*, p. 178.

The solicitor of one of the parties may prepare the award.

The circumstance that an award was prepared by the solicitor of one of the parties, is no ground for setting aside the award: *Fetherstone* v. *Cooper*, 9 Ves. 67; Kyd on Awards, 349, 2nd ed.

10. Stamps.

Agreements.

Agreements for reference to arbitration are stamped like other agreements.

Awards.

The schedule to the Stamp Act, 1870, imposed the following stamp duties on awards:—

"Award in England or Ireland, and Award or Decreet Arbitral in Scotland.

Where the amount or value of the matter in dispute	£	*s.*	*d.*
does not exceed £5	0	0	3
Exceeds £5 and does not exceed £10	0	0	6
,, 10 ,, 20	0	1	0
,, 20 ,, 30	0	1	6
,, 30 ,, 40	0	2	0
,, 40 ,, 50	0	2	6
,, 50 ,, 100	0	5	0
,, 100 ,, 200	0	10	0
,, 200 ,, 500	0	15	0
,, 500 ,, 750	1	0	0
,, 750 ,, 1,000	1	5	0
And where it exceeds £1,000, and in any other case not above provided for	1	15	0."

Objection for want of stamp, how taken.

If an award be made on an improper stamp, and no application be made to enforce the award, the Court will not set it aside: *Preston* v. *Eastwood*, 7 T. R. 95. And if an objection to the stamp be not alleged as a ground for obtaining a rule to show cause to set aside an award, the Court will not suffer it to be relied on afterwards, when cause is shown: *Liddeu* v. *Johnstone*, cit. 2 Tidd, 844, 9th ed. The officer of the Court may refuse to draw up the rule for attachment if the award is not properly stamped: *Hill* v. *Slocombe*, 9 Dowl. 339.

Stamps.

In the case of *Boyd* v. *Emmerson*, 2 A. & E. 184, the point was raised but not determined, whether an opinion of counsel upon a case submitted would be rendered inadmissible in evidence for want of being stamped as an award, by reason of an agreement between the parties to be bound by such opinion. The Court seemed to think that, as there would be no *animus arbitrandi* in the counsel, no stamp would be requisite. But if the fact that the parties had so agreed to be bound, were notified to the counsel, his opinion would probably be considered to be in the nature of an award, and therefore to require a stamp. See also *Sybray* v. *White*, 1 M. & W. 435; where *Parke*, B., said:—"If two persons agree to refer a case to counsel, and to be bound by his opinion; if the opinion does not contain the evidence of the agreement, it is not liable to an award stamp. So also, to take an extreme case, suppose two persons to agree that a third person should decide a particular fact in dispute by putting a mark on a piece of paper; if he did put a mark on it, the paper would not appear to be an award, and would not require a stamp." In the case from which these words are cited, the question arose upon an agreement to abide by the result of the verdict of a miners' jury, which verdict was given in writing, and was held to be admissible without a stamp. An appraisement, though in effect an award, is sufficiently stamped as an appraisement: *Perkins* v. *Potts*, 2 Chitt. 399.

Whether an opinion of counsel requires a stamp.

Where a bond was conditioned for the due discharge by A. of the duties of a clerk, provided that such discharge should be ascertained by B.'s inspection of A.'s accounts, and that the amount so ascertained should be liquidated damages, it was held that A.'s certificate of the amount required an award stamp: *Jebb* v. *M'Kiernan*, 1 Moo. & Malk. 340.

Inclosure award.

An award by commissioners under an Enclosure Act does not require an *ad valorem* stamp, on money paid for equality of exchange: *Doe* d. *Suffield* v. *Preston*, 7 B. & C. 392.

PRECEDENTS.

I. *AGREEMENT on a Purchase (a), between the Vendor and the Purchaser, to refer to* ONE ARBITRATOR *all Disputes existing or which may arise before the last Ten Days preceding the Arbitrator's first Sitting.*

AN AGREEMENT made the ——— day of ———, BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*], of &c., of the other part. WHEREAS by an agreement, dated &c. (*recite agreement for purchase, &c.*). AND WHEREAS disputes and differences exist between the said [*vendor*] and the said [*purchaser*], respecting the said agreement, and otherwise relating to the premises. NOW THESE PRESENTS WITNESS that it is hereby agreed, as follows, that is to say:—

Recital of agreement.

That disputes existed between the parties.

Testatum.

Disputes to be referred.

1. All disputes (*b*) and differences which exist between the said parties respectively, or any of them; and also all other disputes and differences that may, at any time or times, before the last ten days immediately preceding the day which shall be appointed by the arbitrator hereinafter named, for his first sitting in the arbitration to be made in pursuance

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Reference to preceding forms, concerning arbitration.

(*a*) See *Agreement* between the vendors and purchaser of an estate in fee simple, to refer the question whether certain lands were included in the contract, and what compensation the purchaser should receive in consequence of part of the premises being leasehold instead of freehold, *ante*, Vol. 1, p. 492. *Agreement* to refer disputed boundaries, Vol. 1, p. 500.

See also *Arbitration Clauses* on purchase of timber, Vol. 1, p. 482; on partition, Vol. 1, pp. 510, 514; on exchange, Vol. 1, p. 519; on agreement to erect buildings, Vol. 1, pp. 543, 546, 547; to construct a railway, Vol. 1, p. 592; to build a ship, Vol. 1, p. 642; in an *Agreement* between manufacturers and a factor, Vol. 1, p. 561; also other *Arbitration Clauses*, Vol. 1, pp. 577, 604, 645, 822. Reference may also be made to the INDEX to the PRECEDENTS in each volume of this Work.

(*b*) In cases of this kind it is better to make the reference general, as above.

of these presents, exist between the said parties, or any of them, or any matters and things relating thereto, or arising out of the said agreement, shall be referred to the arbitration of [*arbitrator*], of &c. I. Agreement to refer Disputes to one Arbitrator.

2. The award of the arbitrator, if made in writing under his hand and seal, ready to be delivered to the parties hereto, or if they or either of them shall be dead, to their or his executors, or administrators, on or before the ——— day of ——— next, or on or before such other day, not beyond the ——— day of ———, as the arbitrator shall by writing under his hand from time to time appoint, shall be binding and conclusive on all the parties, and their heirs, executors, and administrators. Award, if made before a certain day, to be binding.

3. This reference or submission, and any award made in pursuance thereof, may be made a rule of the Queen's Bench [*or* Chancery] Division of Her Majesty's High Court of Justice, at the instance of any of the parties hereto, his executors, or administrators, without notice to the other or others of them (*c*). Reference to be made a rule of Court.

4. The parties hereto, and each of them, or their or his heirs, executors, or administrators, shall produce to the said arbitrator, all deeds, evidences, books, accounts, vouchers, papers, documents, and writings, in the possession or control of them or him respectively, which the arbitrator may require as being, in his opinion, relative to the premises in question: And shall, so far as in them or him respectively lies, do all such other acts and things as the arbitrator shall require, for better enabling him to make the said award. Parties to produce all deeds, &c.

5. The arbitrator shall be at liberty to go into parol as well as written evidence; and to examine the parties in difference, or any of them, and such other witnesses as he shall think proper, on oath. Arbitrator may take evidence.

(*c*) As to making the submission a rule of Court, see *ante*, p. 101 *seq.*; and as to making the award a rule, see *Jones* v. *Jones*, 14 Ch. D. 593, and see *ante*, p. 107.

Sometimes, instead of the clause providing that the reference, &c., shall be made a rule of Court, a penalty is imposed for revocation as follows:—

3. If either party to this reference or submission shall revoke, or attempt to revoke, the authority of the said [*arbitrator*], such party shall pay to the other party the sum of £——— as liquidated damages; and the said [*arbitrator*]

I. Agreement to refer Disputes to one Arbitrator.

Statement of matters intended to be referred.

6. The solicitor of each of the said parties shall state in writing all the matters and things intended to be referred by his client to the arbitrator, and shall, at least ten days before the day appointed by the arbitrator for his first sitting on the arbitration, deliver a copy of such statement to the solicitor of each of the other parties respectively; and only those matters and things which shall be comprehended in such respective statements shall be taken into consideration by the arbitrator.

Arbitrator to give notice of his first sitting.

7. The arbitrator shall give at least ——— days' previous notice to the solicitor of each of the parties of the day on which he intends to hold his first sitting on the said arbitration.

Costs.

8. The costs of preparing and executing these presents, and a duplicate hereof, and all costs and charges attending the arbitration and award, shall be in the discretion of the arbitrator, and shall be paid and satisfied pursuant to his award; and the arbitrator may direct such costs to be paid as between party and party, or as between solicitor and client, as he shall think fit.

Parties not to bring action.

9. Neither of the parties, his heirs, executors, or administrators, shall bring any action or suit against the other of them, in relation to the premises, or against the arbitrator. In witness, &c.

II. *AGREEMENT to refer to* Three Arbitrators *Matters of Account between a Creditor and Two Debtors, where a Balance is admitted to be due; Agreement to suspend an Action.*

Title of action.

In the High Court of Justice,
Queen's Bench Division.
Between E. F. . . . . Plaintiff,
and
A. B. and C. D. . . . Defendants.

Recital of dealings between parties;

Whereas there have been divers dealings and transactions between the above-named E. F. and A. B., before and since

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may and shall, at the request of such other party, proceed to determine and award concerning the matters hereby referred to him, notwithstanding any such revocation, or attempted revocation.

II. Agreement to refer Matters of Account, and to suspend Actions.

the ——— day of ———, on which there was due and owing from the said A. B. to the said E. F. the sum of £———; and there have been also divers dealings and transactions between the said E. F. and the said A. B. and C. D., since the said ——— day of ———; and several questions, disputes, and controversies have arisen, and are subsisting, not only between the said E. F. and the said A. B., but also between the said E. F. and the said A. B. and C. D.: And whereas there is now pending in the Queen's Bench Division of Her Majesty's High Court of Justice an action, wherein the said E. F. is plaintiff, and the said A. B. and C. D. are defendants; and also an action in the Chancery Division of the same Court, in which the said A. B. and C. D. are plaintiffs and the said E. F. is defendant, touching the said dealings and transactions, and the accounts relating thereto, in which last-mentioned action the said E. F. has filed a counter-claim against the said A. B. and C. D. NOW IT IS HEREBY AGREED by and among the said E. F., A. B., and C. D. as follows, that is to say:—

disputes, and two suits, actions.

Testatum.

Agreement to refer.

1. All questions, disputes, and controversies, in anywise relating to or concerning such dealings or transactions, as well between the said E. F. and the said A. B. as between the said E. F. and the said A. B. and C. D., and the accounts relating thereto shall be referred to the award and determination of [*three arbitrators*], of &c.

Arbitrators may investigate accounts, and award a greater or less sum.

2. Notwithstanding the bond referred to in the statement of claim in the last-mentioned action, the arbitrators are to be at liberty to investigate the whole of the accounts, dealings, and transactions between the parties, and to award a greater or less sum to be due from the said A. B. and C. D., or either of them, jointly or separately, to the said E. F., and to determine the true balances between the said parties, upon the whole of the accounts, dealings, and transactions; And to appoint how and in what proportions such balances shall be paid, and by and to whom.

Actions to be discontinued and dismissed, with or without costs.

3. The arbitrators shall be at liberty to direct the said actions to be discontinued or dismissed, with or without costs; but if with costs, then to ascertain whether such costs are to be paid as between solicitor and client, or as between party and party; and when, and by and to whom they shall be paid.

Agreement to

4. The several parties hereto shall well and truly obey and

II. Agreement to refer Matters of Account, and to suspend Actions.

perform award.

perform the award of the arbitrators, or any two of them, touching and concerning the several matters hereinbefore particularly mentioned, as well as all other actions, causes of action, accounts, claims, and demands whatsoever, between or among the parties up to the date hereof; So as not to question the balance before stated to be due from the said A. B. to the said E. F. on the ——— day of ———; And so as the award be made in writing, under the hands of the arbitrators, or any two of them, and ready to be delivered to the parties, or if they or any of them shall be dead before the award shall have been made, to their respective executors or administrators, or such of them respectively as shall desire the same, on or before the ——— day of ——— next.

Arbitrators may examine parties, &c. on oath; and call for books and papers.

5. The arbitrators, or any two of them, shall have power to examine the parties, and their witnesses, on oath or affirmation, and call for books and papers in the possession or power of either of the parties, which are to be produced on oath or affirmation.

Each party may inspect books, &c.

6. Each of the parties shall in the meantime be at liberty to inspect, peruse, and have copies of all or any of the books, papers, and writings in the hands, custody, or power of the other or others of them the parties respectively, relating to the matters in reference.

Power for arbitrators to proceed *ex parte*, after notice.

7. If either party shall, in the opinion of the arbitrators, or any two of them, without sufficient cause, by non-attendance or non-production of books, papers, or writings, or otherwise delay or impede, or attempt to delay or impede, the progress of the arbitrators, in making their award, the arbitrators, or any two of them, shall be at liberty to proceed *ex parte*, after two days' clear notice to the party or parties causing such delay or impediment as aforesaid, to be left at his or their dwelling-house or place of business.

Arbitrators may employ an accountant.

8. The arbitrators, or any two of them, if they shall think it necessary, shall be at liberty to appoint an accountant to their assistance; the expense of such accountant to be paid, one-half by the said E. F., and the other half by the said A. B. and C. D.; such accountant to be required to make his solemn declaration, according to the statute, of the truth of the account or statement to be made out by him.

Stay of proceedings.

9. All proceedings in the said actions shall be stayed until the ——— day of ——— next, when, if no award shall be

made, or the time for making the same shall not be enlarged by consent, each of the parties shall be at liberty to proceed as they or either of them shall be advised.

II. Agreement to refer Matters of Account, and to suspend Actions.

10. The submission hereby made shall not be defeated or affected by the death of the parties, or any of them, pending the same; but shall be proceeded with, and the matters in difference determined, in the same manner as if the award of the arbitrators had been made and delivered in the lifetime of the party or parties so dying; and the executor or administrator, executors or administrators, of the party or parties so dying shall be, and be deemed and considered to be, to all intents and purposes, a party or parties to the reference or submission hereby made.

Death of parties not to affect the reference.

11. The expenses of the arbitration and award shall be paid, one half by the said E. F. and the other half by the said A. B. and C. D. (*e*).

Expenses of arbitration.

12. This submission shall be made a rule of the Queen's Bench Division of her Majesty's High Court of Justice. IN WITNESS, &c.

Submission to be made rule of Court.

III. *SUBMISSION BY BOND from one to one* (*f*), *in the Common Form.*

KNOW ALL MEN that I [*obligor*], of &c., am bound to

Common obligation from one to one.

(*e*) For clause giving the arbitrators power over costs, of and incident to the submission, arbitration and award, see *ante*, p. 202.

(*f*) Submissions are not unfrequently made by bond, each party executing to the other a bond in a named penalty, to abide by the award of the arbitrator. The penalty named in the bond does not preclude the arbitrator from awarding a larger amount; but no greater sum than the amount of the penalty can be recovered by action on the bond: *Brewer* v. *Bruce*, cit. Watson on Award, p. 4.

An arbitration bond requires a bond stamp, as to which see *post*, p. 342.

An agreement stamp is not necessary to an arbitration bond, containing, besides the usual covenants, an agreement as to payment of costs: *In re Wansborough and Dyer*, 2 Chitt. 40.

In some cases it may be prudent to take a warrant of attorney to confess judgment for a specific sum, as a further security for the performance of an award, in order that execution may be

III. Bond, one to one.

A general condition of a common arbitration bond.

[*obligee*] of &c., in the sum of [*penalty*] to be paid to the said [*obligee*] or to his attorney, executors, administrators or assigns. For which payment I bind myself (*g*) by these presents. Sealed with my seal. Dated this ——— day of ———, 18—.

THE CONDITION of the above-written bond is such that if the said [*obligor*], his heirs, executors, and administrators, shall in all things well and truly obey, abide by, and perform the award, and final determination of [*arbitrators*], of &c. (*h*), arbitrators named as well on behalf of the above-bounden [*obligor*], as of the above-named [*obligee*], to award and determine concerning all actions, causes of action, claims, and demands whatsoever, which at any time or times heretofore have been had, brought, commenced, done, suffered, or depending by and between the parties; so as the said award be made in writing, under the hands of the arbitrators (*i*), and ready to be delivered to the parties, or if they or either of them shall be dead before the award shall have been made

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immediately taken out, either against the property or the person of him who neglects or refuses to perform the award. The defeazance should contain the substance and effect of the bond or agreement, with a declaration that no execution should issue until non-performance of the award.

So in the case of dispute concerning the title to lands, where it was probable that the party in possession might be directed by the award to deliver the possession to the other party, it was usual to take a warrant of attorney to confess judgment in ejectment. For formerly, where a party in possession refused to yield up lands in pursuance of the award, an ejectment was necessary to recover the possession: *Vide Doe* d. *Morris* v. *Rosser*, 3 East, 15.

Now, however, by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), sect. 16, *ante*, p. 191, where an award directs delivery of possession of lands, the Court may order delivery, and the order is to have the effect of a judgment in ejectment; but a warrant of attorney will prevent the trouble and expense of an application to the Court for such order. For a form of a warrant of attorney, see tit. MORTGAGES.

(*g*) The heirs of the obligor are bound, though not expressly mentioned, *post*, p. 345, note (*e*).

Three arbitrators.

(*h*) If there be three arbitrators, which it is sometimes thought advisable to appoint in the first instance, as it prevents the necessity of having an umpire, say, "or any two of them."

(*i*) "or any two of them,"

III. Bond, one to one.

to their respective executors or administrators, who shall desire the same, on or before the ——— day of ——— next (*k*), then the above-written bond shall be void, and of no effect. And the parties hereby agree that this submission shall or may be made a rule of the Queen's Bench Division of Her Majesty's High Court of Justice at the instance of either of the parties, his executors or administrators. And that the arbitrators [and umpire] shall for the purpose of enabling them [or him] to make the award [or umpirage], be at liberty to go into parol as well as written evidence; and to examine the parties or either [or any or one] of them, and such other witnesses as they or he shall think proper, on oath.

Rule of Court.

Arbitrators to receive parol or written evidence, and examine on oath.

Signed, sealed, and delivered
in the presence of

(*k*) If the arbitrators are to extend the time, say, "or, on or before such other day, not beyond the ——— day of ———, as the arbitrators [or any two of them] shall, by writing under their hands, from time to time appoint."

Enlarged time.

If there be only two, or an equal number of arbitrators appointed, and on their disagreement an umpire is to be appointed, say,

Umpire.

"And in case the arbitrators should not make such their award of and concerning the premises within the time limited as aforesaid, if the above-bounden [*obligor*], his heirs, executors, and administrators, on his and their part and behalf, should in all things well and truly obey, abide by, and perform the award, and final determination of [*umpire*], of &c., being the umpire named and chosen by the parties [*or*, "of such third person as the arbitrators shall in writing nominate and appoint as umpire] in and concerning the premises: *So as* the umpire do make and set down his award and umpirage in writing, and ready to be delivered to the parties or their respective executors or administrators who shall desire the same, on or before the ——— day of ——— next,—Then," &c.

And insert in the last clause the words in brackets, which will be omitted if no umpire is to be appointed.

IV. *SUBMISSION BY BOND from One to Two jointly and severally to abide by the Award of Three Arbitrators, or any Two of them, or of their Umpire.*

Obligation, one to two jointly and severally.

KNOW ALL MEN BY THESE PRESENTS, that I [*obligor*], of &c., am bound to [*obligee*], of &c., and [*other obligee*], of &c., jointly and severally in the sum of [*penalty*], to be paid to the said [*obligee*] and [*other obligee*], or either of them, or the attorney, executors, administrators or assigns, of them or either of them: For which payment to be well and truly made, I bind myself by these presents. Sealed with my seal. Dated, &c.

Condition of arbitration bond to abide by award of three arbitrators, or any two of them;

THE CONDITION of the above-written bond or obligation is such, that if the above-bounden [*obligor*], his heirs, executors, and administrators, shall in all things well and truly obey, abide by, and perform the award and determination of [*three arbitrators*], of &c., arbitrators named, on the parts of the said [*obligor*] and the said [*obligees*], to arbitrate, award, and determine of and concerning all and all manner of actions, causes of action, quarrels, controversies, trespasses, damages and demands whatsoever, at any time or times heretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending, by or between the said [*obligor*] and the said [*obligees*], or either of them, or of such two of the said arbitrators as shall consent to accept and take upon themselves the making of such award (in case any of them should refuse or decline to make the same); so as the said award be made by the said [*three arbitrators*], or such two of them as shall so agree to make the same as aforesaid, on or before the ——— day of ———,

or of their umpire.

now next ensuing; but in case the said arbitrators, or some two of them (if they should all take upon themselves the making of the said award), should not agree in their award, then, if the above-bounden [*obligor*], his heirs, executors, and administrators, shall in all things well and truly obey, abide by and perform the award and determination of such person as shall be nominated and chosen by the said [*arbitrators*], or by such two of them as shall consent and agree to take upon themselves the said arbitration between the parties, of and concerning the premises; so as such umpire, so to be chosen

IV. Bond, one to two, to abide the Award of three, or two of them, or their Umpire.

as aforesaid, do make his award and determination of and concerning the premises, on or before the ——— day of ——— next, the above-written bond shall be void and of no effect; And the said [*obligor and obligees*] hereby agree that this submission shall be made a rule of the Queen's Bench Division of Her Majesty's High Court of Justice; And that this submission shall not be revoked by the death of the said [*obligor*] and the said [*obligees*], or either of them, before the making of the said award.

In witness, &c.

V. *COVENANT by* Executors and Legatees *to abide by the Award of an Arbitrator respecting the* Estate *and* Effects of a Testator, *and other matters.*

Parties.

THIS INDENTURE (*l*), made &c., Between E. G., of &c., and J. A., of &c., executors of the last will and testament of [*testator*], late of &c., deceased, of the first part; P. M. G., one of the grandchildren of the said [*testator*], deceased, by his daughter, late the wife of the said E. G., now also deceased, of the second part; the said P. M. G., E. A., wife of the said J. A., and only surviving daughter of the said [*testator*], deceased, J. B., of &c., husband of L. G., granddaughter of the said [*testator*], deceased, E. G. the younger, of &c., Jos. G., of &c., John G., of &c., P. A., of &c., and S. A., of &c., all grandchildren of the said [*testator*], deceased, of the third part: Whereas differences have arisen between the said E. G. the elder and J. A., as such executors as aforesaid, and the said P. M. G.; and also between the said executors and the said E. A., the said P. M. G., the said J. B., the said E. G. the younger, the said Jos. G., the said John G., the said P. A., and S. A., in their respective rights and qualities above mentioned, touching the estate and effects of the said [*testator*], deceased; and also touching several other matters and things: And in order to put an end to the said differences, the said parties have agreed to refer the same to the award and deter-

Recital of disputes.

(*l*) Submission by deed cannot be varied by parol or by writing not under seal: *Re Morphett*, 2 Dowl. & L. 967, and see *ante*, p. 130.

V. Covenant by several to refer Disputes respecting Testator's Effects, &c.

mination of X. Y., of &c., barrister-at-law. NOW THIS INDENTURE WITNESSETH, that they the said parties hereto do, and each of them doth, severally and respectively covenant and agree with each other to observe and perform the award and determination of the said [*arbitrator*], of and concerning the premises aforesaid, or anything in anywise relating thereto; And also of and concerning all actions, causes of action, accounts, sums of money, damages and demands whatsoever, at any time heretofore had, made, moved, brought, commenced, committed or depending by or between the said parties, or any of them; So as the said award of the said arbitrator be made in writing. AND IT IS ALSO AGREED, that [*add any provisions thought advisible, as to which see preceding Precedents*].

Testatum.

IN WITNESS, &c.

VI. *APPOINTMENT of an* ARBITRATOR *in pursuance of an Arbitration Clause in* ARTICLES *of* PARTNERSHIP.

MEMORANDUM.

Recital of articles of partnership,

WHEREAS by articles of partnership, dated &c., and made &c., amongst other things, IT WAS AGREED, that in case any dispute or question should arise between the said parties relative to the construction of the said articles, or to all or any of the matters or things therein contained, the same should be referred to the arbitration of two indifferent persons, one to be named by each of the parties, with power for such arbitrators to appoint an umpire in case of their disagreement: And that the award of the said arbitrators or umpire should be final and conclusive: AND WHEREAS disputes have arisen between the said parties relating to their partnership (and also relating to several other matters and things), and they have in pursuance of the said covenant agreed to refer the same accordingly. NOW, THEREFORE, I [*partner*] hereby nominate and appoint [*arbitrator*], of &c., an arbitrator for me and on my behalf, to hear and determine the disputes aforesaid, in accordance with the provisions of the said articles of partnership.

that disputes have arisen.

Appointment of arbitrator.

Dated the ——— day of ———, 18—.

Witness, A. B. [*Signature.*]

VII. *NOTICE by a* LANDOWNER *of* CLAIM *for* COMPENSATION, *and of desire to have the same* SETTLED *by* ARBITRATION *under the Lands Clauses Consolidation Act*, 1854, *s.* 23; *and* APPOINTMENT *of* ARBITRATOR.

To the ——— Railway Company.

WHEREAS I have received notice stating that you require to purchase or take for the purposes of your undertaking the lands specified in such notice, and particularly described in the schedule hereunder written, and that you are willing to treat for the purpose thereof, and as to the compensation to be made to me for the damage that may be sustained by me by reason of the execution of your works. AND WHEREAS upon such treaty you have offered me the sum of £———, and no more, in full of purchase-money and compensation in respect of the premises, and I am not satisfied therewith. NOW I HEREBY give you notice that I am interested in the said lands as tenant in fee simple in possession, and that I claim the sum of £——— [*a sum exceeding* 50*l.*], as purchase-money and compensation in respect of such my interest, including compensation for all damage which I shall incur by reason of the severing of the lands intended to be taken from my other lands, or by your otherwise injuriously affecting my other lands by the execution of your works, but exclusive of all costs, charges and expenses incurred, or which may be incurred by me, in relation to the premises. AND I further hereby give you notice that, in case you should dispute the amount of compensation so claimed by me as aforesaid, I desire to have the same settled by arbitration pursuant to the provisions of the Lands Clauses Consolidation Act, 1845. AND I do hereby nominate and appoint [*arbitrator*], of &c., to be the arbitrator in my behalf to settle and determine the amount of the purchase-money and compensation to be paid to me by you in respect of my interest in the said lands. AND I request you to nominate and appoint an arbitrator to act in your behalf [*or end as in next Precedent*] (*m*).

Recital of notice of lands being required;

of amount of compensation offered.

Statement of interest in lands;

of amount of compensation claimed;

of desire that amount shall be settled by arbitration.

Appointment of arbitrator.

Request to company to appoint arbitrator.

Dated the ——— day of ———, 18—. A. B.

[THE SCHEDULE ABOVE REFERRED TO.]

(*m*) The landowner should not appoint an arbitrator to act on his behalf without having endeavoured and failed to induce the company to concur with him in appointing a single arbitrator: *Yates* v. *Mayor of Blackburn*, 6 H. & N. 61.

VIII. *NOTICE by a* LANDOWNER *of* CLAIM *for* COMPENSATION, *and of desire to have the same* SETTLED *by* ARBITRATION *under the Lands Clauses Consolidation Act*, 1845, *s.* 68.

To the ——— Railway Company.

Recital that lands have been taken, &c.

WHEREAS you have taken for [*or* injuriously affected by] the execution of the works of your railway the lands and hereditaments described in the schedule hereunto annexed:

Statement of interest in lands;

NOW I HEREBY give you notice that I am interested in the said lands as tenant under a lease for the unexpired residue of a term of 99 years from the ——— day of ———, 18—(*n*):

of amount of compensation claimed;

AND I HEREBY give you notice that I claim the sum of £——— [*a sum exceeding* 50*l.*], as compensation in respect of the premises; and also, that unless you shall within twenty-one days after the receipt of this notice pay to me the said sum of £———, or shall enter into an agreement in writing to pay the same,

of desire that amount shall be settled by arbitration;

I hereby signify my desire to have the amount of such compensation settled by arbitration pursuant to the provisions of the Lands Clauses Consolidation Act, 1845;

request to company to concur in appointing arbitrator.

And I accordingly request you to concur with me in the appointment of a single arbitrator, or else to nominate and appoint an arbitrator to act on your behalf, by whom, together with an arbitrator to be in such case appointed by me, the amount of compensation to be paid to me shall be settled.

Dated the ——— day of ———, 18—. A. B.

THE SCHEDULE ABOVE REFERRED TO.

IX. *APPOINTMENT of a single* ARBITRATOR *by a* LANDOWNER *and a* RAILWAY COMPANY *under the Lands Clauses Consolidation Act*, 1845.

Recitals:

of notice to take land;

WHEREAS the ——— Railway Company are, by the ——— Act, 18—, and the public Acts incorporated therewith, authorized to take the lands and hereditaments described in the schedule hereunder written, and have given due notice to [*landowner*], of &c., that they require to take the same premises for the purposes of their undertaking: AND WHEREAS

(*n*) As to the necessity for *particularly* describing the nature of the interest under a lease, see *Healey* v. *Thames Valley Rail. Co.*, 13 W. R. 44.

the said [*landowner*] is entitled to the said premises as tenant in fee simple in possession, or is otherwise by the said Acts enabled to sell and convey or release the same: AND WHEREAS the said [*landowner*] and the Company have been unable to agree as to the amount of compensation to be paid by the Company for the interest of the said [*landowner*] in the premises, and for the damage that may be sustained by him by reason of the execution of the works, and the said landowner has required that the amount of such compensation shall be settled in manner provided by the Lands Clauses Consolidation Act, 1845, by the arbitration of a single arbitrator: NOW THESE PRESENTS WITNESS that, in pursuance of the provisions of the last hereinbefore-mentioned Act, the said [*landowner*] and the Company do and each of them doth hereby nominate and appoint [*arbitrator*], of &c., to be the single and sole arbitrator to settle and determine the questions of disputed compensation which have so arisen as aforesaid, having regard not only to the value of the interest of the said [*landowner*] in the premises intended to be taken, but also to the permanent damage and injury (if any) which may have been or may be sustained by the said [*landowner*] by reason of the severing of the same premises from his other lands, or by otherwise injuriously affecting such other lands by the exercise of the powers of any of the Acts hereinbefore mentioned. IN WITNESS WHEREOF the said [*landowner*] and [*director*] and [*director*], two of the directors (*a*) of the ——— Railway Company, on behalf of the Company, have hereunto set their hands this ——— day of ——— 18—.

IX. Appointment of Arbitrator.

of landowner's interest;

of dispute as to amount of compensation.

Appointment of single arbitrator.

THE SCHEDULE ABOVE REFERRED TO.

X. *APPOINTMENT of an* ARBITRATOR *by a* RAILWAY COMPANY *under the Lands Clauses Consolidation Act*, 1845.

Appointment of arbitrator.

IN PURSUANCE of the ——— Act, 18—, and of the Lands Clauses Consolidation Act, 1845, incorporated there-

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(*a*) An appointment of an arbitrator under the Lands Clauses Consolidation Act, 1845, is to be "under the hands of the promoters or any two of them, or of their secretary or clerk": see sect. 25, *ante*, p. 110: and sect. 126 of the Railways Clauses Consolidation Act, 1845, specifies "the secretary or any two of the directors" as the proper persons to sign an appointment under that Act: see *ante*, p. 114.

X. Appointment of Arbitrator.

with, the ——— Railway Company do by this writing under the hand of their secretary, nominate and appoint [*arbitrator*], of &c., to be the arbitrator on their behalf in a question of disputed compensation which has arisen with respect to the amount to be paid by the Company to [*landowner*], of &c., for his estate and interest, as tenant in fee simple in possession (*o*), of and in the lands and hereditaments situate at ———, in the county of ———, and required to be taken by the Company, and which premises are in the plan and book of reference of the said railway, respectively deposited with the clerk of the peace of the county of ———, referred to by the several numbers and descriptions given in the schedule hereunder written, and also with respect to the damage (if any) which the said [*landowner*] may sustain by reason of the taking of the premises by the Company and the execution of the works of the said railway. Dated the ——— day of ———, 18—.

Subject-matter of reference.

A. B.,
Secretary of the ——— Railway Company.

THE SCHEDULE ABOVE REFERRED TO.

XI. *NOTICE of* APPOINTMENT *of* ARBITRATOR *by a* RAILWAY COMPANY.

To [*landowner*], Esquire,

Notice of appointment of arbitrator by the Company.

TAKE NOTICE that the ——— Railway Company have this day nominated and appointed [*arbitrator*], of &c., to be the arbitrator on their behalf in the question of disputed compensation which has arisen between you and the Company respecting your interest in lands and hereditaments situate at ———, in the county of ———, and required to be taken by the company in pursuance and for the purposes of the ——— Act, 18— : And the Company do hereby request you to nominate and appoint an arbitrator to act in your behalf in the said question. Dated the ——— day of ———, 18—.

Request to landowner to appoint.

A. B.,
Secretary of the ——— Railway Company.

(*o*) *Or*, "for his interest as tenant under a lease for the unexpired residue of a term of ninety-nine years from the ——— day of ———, 18—."

XII. *NOTICE by a* TENANT *to a* LANDLORD *of his intention to claim* COMPENSATION *under the Agricultural Holdings (England) Act*, 1883.

THE AGRICULTURAL HOLDINGS (ENGLAND) ACT, 1883.

To [*landlord*], of &c., Esquire.

IN PURSUANCE of the provisions of the above Act I hereby give you notice that on the determination, which will be on the ——— day of ——— next, of my tenancy of the ——— farm situate in the parish of ——— in the county of ———, which I hold of you, I intend to claim compensation for improvements executed by me thereon as particularly set forth in the schedule hereunder written, and also for the breach of covenant on your part also specified in the same schedule.

SCHEDULE.

Date.	Particulars of Claim.	Amount claimed.
18—	Draining meadow, 10 acres, at a cost of £—— per acre	£——
18—	Laying down —— Close in permanent pasture	£——
18—	Erecting barn on the said holding	£——
18— to 18—	Application to land of purchased artificial manures, as follows:— In —— 18—, —— tons of ——, at £—— per ton.....	£——
	In ——, 18—, &c.	£——
18— to 18—	Consumption of —— tons of oil cake at £—— per ton	£——
	Breach of covenant by landlord to repair the roof of the farm house, such covenant being contained in a lease dated, &c.	£——
	Total amount claimed	£——

XIII. *NOTICE of* COUNTERCLAIM *by* LANDLORD *to* TENANT *under the Agricultural Holdings (England) Act*, 1883.

THE AGRICULTURAL HOLDINGS (ENGLAND) ACT, 1883.

To Mr. [*tenant*], of &c.

WITH REFERENCE to your notice of claim dated &c., and in pursuance of the above Act, I hereby give you notice

XIII. Notice of Counterclaim by Landlord.

that I intend to make a claim in respect of arrears of rent, and also in respect of acts of waste committed and permitted by you, and of breaches of covenant committed by you, during your tenancy of the said farm, the particulars of which arrears and acts of waste and breaches of covenants are respectively set forth in the schedule hereunder written.

Dated &c.

[*Signature of Landlord.*]

SCHEDULE.

Particulars of Claim.	Amount claimed.
Arrears of rent	£——
Waste in cutting down trees in —— Close	£——
Waste in pulling down a shed, &c.	£——
Breach of covenant in not [*describe breaches*], such covenant being contained in the lease dated, &c., whereby the tenancy was created	£——
Total amount claimed	£——

XIV. *APPOINTMENT of a* SINGLE REFEREE *by a* LANDLORD *and* TENANT *under the Agricultural Holdings (England) Act*, 1883.

THE AGRICULTURAL HOLDINGS (ENGLAND) ACT, 1883.

Appointment of referee.

IN PURSUANCE of the above Act, WE [*landlord*], of &c., Esquire, and [*tenant*], of &c., farmer, hereby agree that all matters in difference between us as to the amount and mode and time of payment of compensation, if any, under the said Act in respect of a holding known as the ——— farm now [*or* late] in the occupation of the said [*tenant*] shall be referred to the award and determination of [*arbitrator*], of &c., land surveyor, whom we hereby appoint single referee for that purpose.

Witness A. B.

[*Landlord's signature.*]

[*Tenant's signature.*]

XV. *APPOINTMENT of a* REFEREE *by a* LANDLORD *under the Agricultural Holdings (England) Act*, 1883.

THE AGRICULTURAL HOLDINGS (ENGLAND) ACT, 1883.

IN THE MATTER of a reference
Between A. B. of &c. . . . Landlord
and
C. D. of &c. . . . . Tenant.

WHEREAS the said C. D. claims the sum of £——— as compensation in respect of the unexhausted value of improvements executed by him on a holding known as the ——— farm in the parish of ———, in the county of ———, late in his occupation, as appears by a notice of claim dated the ——— day of ———, 18—, and duly given to the said A. B. pursuant to the provisions of the said Act: AND WHEREAS the said A. B. disputes the said claim and claims the sum of £——— as compensation in respect of breaches of covenant committed by the said C. D. during his tenancy and other matters connected therewith or with his said holding, as appears by a notice of counterclaim dated &c., and duly given to the said C. D. pursuant to the provisions of the said Act: AND WHEREAS it has been agreed by the said A. B. and C. D. that the said disputes between them shall be referred to the award and determination of two referees and their umpire pursuant to the provisions of the Act above mentioned: NOW THEREFORE the said C. D. hereby appoints E. F. of &c. to be and act as referee on his behalf in the disputes so referred as aforesaid in accordance with the provisions of the said Act.

Recital of tenant's claim;

of landlord's counter-claim;

of agreement to refer disputes.

Appointment of referee.

Witness G H. [*Landlord's signature.*]

XVI. *NOTICE of* APPOINTMENT *of* REFEREE *by a* TENANT *under the Agricultural Holdings (England) Act*, 1883.

THE AGRICULTURAL HOLDINGS (ENGLAND) ACT, 1883.

IN THE MATTER OF, &c.

TAKE NOTICE that [*tenant*], of &c., has this day appointed [*referee*], of &c., to be the referee on his behalf in the question of disputed compensation between you and the said [*tenant*], respecting the holding known as ——— farm, in

Notice of appointment;

XVI. Notice of Appointment of Referee.

the parish of ———, in the county of ———, late in his occupation, pursuant to the provisions of the Agricultural Holdings (England) Act, 1883: And the said [*tenant*] hereby requires you to appoint a referee to act on your behalf in the same question: And further requires that the umpire in the said reference shall be appointed by the Land Commissioners [*or* by the County Court].

request to landlord to appoint;

that umpire shall be appointed by Land Commissioners.

Dated the ——— day of ———, 18—.

[*Tenant's signature.*]

To [*landlord*], Esq.

XVII. *NOTICE to a* Referee *requiring him to act under the Agricultural Holdings* (*England*) *Act*, 1883.

The Agricultural Holdings (England) Act, 1883.

In the Matter of, &c.

Notice requiring referee to act.

TAKE NOTICE that the above-named [*landlord*] and [*tenant*] hereby require you, as referee in the question between them of disputed compensation, to act in such reference within seven days after the service upon you of this notice, and that, if you fail so to act, the said reference will begin afresh, as if no referee had been appointed.

[*Date.*] [*Signature.*]

To [*referee*], of &c.

XVIII. *REQUEST to* Referees *to* appoint *an* Umpire *under the Agricultural Holdings* (*England*) *Act*, 1883.

The Agricultural Holdings (England) Act, 1883.

In the Matter of, &c.

Notice requiring referee to appoint umpire.

TAKE NOTICE that the above-named [*landlord or tenant*] hereby requires you to appoint an umpire in this reference, and that if for seven days after service upon you of this request you fail to appoint an umpire as aforesaid, an application will be made by the said [*landlord or tenant*] to the County Court to appoint an umpire, pursuant to the provisions of the above Act.

[*Date.*] [*Signature.*]

To [*referee*], of, &c., and [*reference*], of, &c.

XIX. *APPOINTMENT of a* Referee *in place of a* Deceased Referee *under the Agricultural Holdings* (*England*) *Act*, 1883.

The Agricultural Holdings (England) Act, 1883.

In the Matter of, &c.

IN PURSUANCE of the provisions of the above Act, I hereby appoint [*referee*], of &c., to be a referee in the above matter, in the place of X. Y., of &c., deceased [*or* who has become incapable of acting, *or* who has failed to act for seven days, notice has been duly served upon him in that behalf]. Appointment of referee.

Dated the ——— day of ———, 18—.

[*Signature of landlord or tenant, as the case may be.*]

Witness G. H.

XX. *APPOINTMENT by* Arbitrator *of* Time *and* Place *of* Meeting.

In the Matter of, &c.

I APPOINT Monday, the ——— day of ——— next, for proceeding in the above reference, at the hour of ——— in the forenoon, at ———; And I hereby give notice that if either party shall fail to appear before me without having previously given me good and sufficient reason for such default, I shall, at the request of the other party, if present, proceed with the reference *ex parte*. Appointment of meeting. Notice to proceed *ex parte*.

Dated the ——— day of ———, 18—.

To [*parties*]. [*Arbitrator's signature.*]

XXI. *NOTICE to Produce* Documents *by a* Solicitor *of One of the Parties in an Arbitration.*

In the Matter of the arbitration between A. B. and C. D.

To Messrs. ——— and ———, Solicitors.

THIS IS TO GIVE YOU NOTICE to produce before [*arbitrator*] and [*arbitrator*], the arbitrators to whom all matters in difference between the above-named parties have

XXI. Notice to produce Documents.

been referred, to-morrow at ——— o'clock, at the ——— Hotel, ——— Street, all books, deeds, writings, vouchers and other documents whatsoever relating to the matters in difference between the said parties so referred as aforesaid, now in your possession, custody or control, and particularly a certain indenture dated, &c., and made between, &c. [*describe the instrument*]. Dated the ——— day of ———.

E. F.
Solicitor for A. B., Esquire.

XXII. *NOTICE to Produce* DOCUMENTS *by an* ARBITRATOR.

IN THE MATTER of the arbitration between A. B. and the ——— Railway Company.

To A. B., Esquire.

PURSUANT to the powers given to me by the Lands Clauses Consolidation Act, 1845 (*o*), and of every other power me hereunto enabling, I HEREBY REQUIRE you to produce before me on ——— next, at my office ——— Street, Westminster, the several books of account, deeds, writings and other documents, specified in the schedule hereto annexed, and all other documents relating to the matters referred to me in the above-mentioned arbitration (*p*). Dated the ——— day of ———, 18—.

C. D.
Arbitrator.

THE SCHEDULE ABOVE REFERRED TO.

(*o*) Or otherwise state the submission. As to the power of an arbitrator under this Act to require production of documents, see 8 & 9 Vict. c. 18, s. 32. Arbitrators, or their umpire, are given similar powers by the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 133; the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 132; and the Railway Companies Arbitration Act, 1859 (22 & 23 Vict. c. 59), s. 18.

(*p*) Where an arbitrator has power, by the terms of the reference or by statute (as in the case of the above Precedent), to require the production of documents, compliance with his demand is enforceable by attachment: *Arbuckle* v. *Price*, 4 Dowl. 174. Wherever, therefore, any difficulty is anticipated as to willingness

XXIII. *NOTICE by* ARBITRATORS *to* UMPIRE *of Disagreement.*

IN THE MATTER of the arbitration between A. B. and C. D.
To ———, Esquire, Umpire.

THIS IS TO GIVE YOU NOTICE, that we are unable to agree with regard to the matters referred to us in the above-mentioned arbitration, and that there is no probability of our making any award, and that you are at liberty to proceed as umpire forthwith, to investigate and decide on the said matters. Dated the ——— day of ———, 18—.

E. F. }
G. H. } Arbitrators.

XXIV. *ENLARGEMENT of the Time for making an Award by the* PARTIES *in Difference.* (*Endorsed.*)

KNOW ALL MEN BY THESE PRESENTS, That WE, the within-named [*parties*], do hereby give and allow unto the within-named [*arbitrators*] further time for making their award of and concerning the several matters within referred to them, until the ——— day of ——— now next ensuing; And we do hereby declare and agree, that the provisions mentioned in the within-written agreement of reference by us touching the matters in difference shall be and shall continue in full force during the enlarged time hereby given for making the same award, as fully and effectually in all respects as if the said enlarged time had been mentioned in the said agreement, instead of the time thereby limited. IN WITNESS, &c.

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to produce, it is advisable that a copy of this notice should be personally served on the party: Russ. Arbitr. 777, note (*q*).

It is no ground for refusing compliance with the demand of an arbitrator, having a general power to require production of documents, to say that the books required merely relate to old accounts which have long since been settled, and no longer in difference; nor even that it has been expressly agreed between the parties that such accounts should form no part of the matters of the reference. It is a question entirely for the arbitrator what are properly matters in difference: *Arbuckle* v. *Price, ubi supra.*

XXV. *ENLARGEMENT of the Time for making an Award by the* ARBITRATORS.

IN THE MATTER of the arbitration between A. B. and C. D.

WE, the undersigned, by virtue of the power given to us by an agreement dated, &c., whereby the matters in difference between the above-named parties were submitted for arbitration, do hereby enlarge [*or* further enlarge] the time for making our award, respecting the said matters, until the ——— day of ——— next, on or before which day our award shall be made and published. As WITNESS our hands this ——— day of ——— 18—.

E. F. }
G. H. } Arbitrators.

XXVI. *REVOCATION of* SUBMISSION *by a Party.*

Revocation of submission.

KNOW ALL MEN BY THESE PRESENTS, that I [*party*], of ———, in the county of ———, do hereby revoke, annul, and make void all the powers and authority which by a memorandum of agreement, dated the ——— day of ———, 18—, and expressed to be made between [*parties*], were given to [*arbitrator*], of &c. and [*arbitrator*], of &c., the arbitrators thereby nominated and appointed to investigate, award, and determine all matters in difference between me and [*other party*], of &c., concerning the dealings and transactions in the said memorandum of agreement mentioned: AND I do further hereby discharge and prohibit the said [*arbitrator*] and [*arbitrator*], or either of them, from making any award, or further proceeding in the matter of the said arbitration. As WITNESS my hand [and seal (*q*)] this ——— day of ———, 18—.

Discharge of arbitrators.

Witness, C. D. A. B.

(*q*) See, as to when a submission is revocable, *ante*, p. 130. If the submission is by deed it would appear that the revocation should likewise be by deed: West Symb. Pt. II. tit. *Compromise*, sect. 42. See, also, *Re Morphett*, 2 Dowl. & L. 967.

Whether the revocation be by deed or parol, notice should be given to the arbitrators and to the other party: see *Marsh* v. *Bulteel*, 5 B. & Al. 507.

XXVII. *APPOINTMENT of a* JOINT ARBITRATOR, *by Two Arbitrators.* (*By Endorsement.*)

WE [*arbitrators*], the arbitrators within named, by this memorandum in writing under our hands, made before entering upon the within-mentioned arbitration, do hereby nominate and appoint [*third arbitrator*], of &c., the third arbitrator, to whom, together with ourselves, the within-mentioned matters shall be referred, according to the tenor and effect of the within rule (*or* within-written bond or obligation, *or* indenture), On condition (*r*) that he do, within ——— days from the date hereof, in writing, consent to act therein accordingly. IN WITNESS, &c.

XXVIII. *APPOINTMENT of an* UMPIRE *by Arbitrators.* (*By Endorsement.*)

WE, the within-named [*arbitrators*], do hereby nominate and appoint [*umpire*], of &c., to be the umpire (*s*) in the matters within referred, On condition (*r*) that he do, within ——— days from the date hereof, in writing, accept the umpirage (*t*). As WITNESS our hands, &c. (*u*).

XXIX. *APPOINTMENT of an* UMPIRE *by Arbitrators.* (*Not Endorsed.*)

WE, the undersigned arbitrators, by virtue of the powers to us given by an agreement of reference made on the ——— day of ———, 18—, between, &c., [*or*, by an order of nisi prius made on the ——— day of ———, 18—, in an action

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(*r*) This is prudent, *vide ante*, p. 136.

(*s*) If it be to assist the arbitrators (see *Still* v. *Halford*, 4 Camp. 17), say,

"To assist us in" &c. Third arbitrator.

(*t*) If the consent of the parties be requisite, add,

"*And* we the said [*parties*] do hereby consent thereunto."

(*u*) No stamp is necessary: *Routledge* v. *Thornton*, 4 Taunt. 704. Stamp.

XXIX. Appointment of Umpire.

in which A. B., of &c., was plaintiff, and C. D., of &c., was defendant, *or* by the Agricultural Holdings Act, 1883, *or as the case may require*], do hereby nominate and appoint [*umpire*], of &c., to be the umpire, according to the provisions of the said agreement of reference [*or* order, *or* act], On condition, &c. (*see last Precedent*). As WITNESS our hands, &c.

XXX. *APPOINTMENT of an* UMPIRE *by* ARBITRATORS *under the Lands Clauses Consolidation Act*, 1845.

IN THE MATTER of the Lands Clauses Consolidation Act, 1845, and of the ——— Act, 18—, and of a question of disputed compensation arisen under the said Acts between the ——— Railway Company and [*landowner*], of &c., Esquire.

WE, the undersigned [*arbitrator*], of &c., the arbitrator appointed by and on behalf of the above-named Company, and the undersigned [*arbitrator*], of &c., the arbitrator appointed by and on behalf of the above-named [*landowner*], do hereby, before entering upon the matters referred to us, nominate and appoint [*umpire*], of &c., to be the umpire in the matter of the question of disputed compensation above referred to, to decide on any matters on which we shall differ, or which shall be referred to him under the provisions of the ——— Act, 18—, or of the Lands Clauses Consolidation Act, 1845. As WITNESS our hands this ——— day of ———, 18—.

A. B.
C. D.

XXXI. *REQUEST to* ARBITRATORS *to appoint an* UMPIRE *under the Lands Clauses Consolidation Act*, 1845.

IN THE MATTER of, &c. [*as in last Precedent.*]

To [*arbitrator*], of &c., and [*arbitrator*], of &c.

I, the undersigned, being tenant in fee simple in possession

XXXI. Request for Appointment of Umpire.

of certain lands and hereditaments situate at ——— in the county of ———, in respect of which the question of disputed compensation above referred to has arisen, do hereby request you the above-named [*arbitrator*], and you the above-named [*arbitrator*], who have been appointed arbitrators the one by and on behalf of the above-named company, and the other by and on behalf of myself, and to whom the said question is referred, within seven days after the service hereof upon you, and before you enter upon the matters referred to you, to nominate and appoint an umpire to decide on any matter which has been or shall be referred to you under the provisions of the Lands Clauses Consolidation Act, 1845, or the above-mentioned ——— Act, 18—, and on which you may differ. And I further give you notice that if you shall refuse, or shall for seven days after service upon you of this my request, neglect to appoint an umpire, I shall make application to the Board of Trade to appoint an umpire under the provisions of the Lands Clauses Consolidation Act, 1845. Dated the ——— day of ———, 18—.

A. B.

XXXII. *AFFIDAVIT of the* DUE EXECUTION *of the* SUBMISSION, *in order to its being made a* RULE OF COURT.

IN THE HIGH COURT OF JUSTICE,
QUEEN'S BENCH DIVISION.

Affidavit of execution of bond.

I, A. B., of &c., make oath and say: On the ——— day of ——— I was present at and did then see the execution of the bond or obligation hereunto annexed: And [*obligor*], of &c., Esquire, therein mentioned, did then duly sign, seal, and as his act and deed deliver the said bond or obligation in the presence of me, this deponent: And the name [*obligor*], set and subscribed to the said bond or obligation, is of the proper handwriting of the said [*obligor*]: And that the name A. B., set and subscribed as the witness thereto, is of the proper handwriting of me, this deponent.

SWORN, &c. [Witness.]

XXXIII. *AWARD of one Arbitrator for Payment of a* Sum of Money; *and for* Mutual Releases.

Recital of differences and submission;

TO ALL TO WHOM these presents shall come, I, [*arbitrator*], of &c., send greeting. Whereas divers differences and disputes having arisen between A. B., of &c., and C. D., of &c., the said A. B. and C. D., by an agreement dated &c., and made &c., agreed to refer the same to the award and determination of me the said [*arbitrator*]; and did accordingly, by their several obligations, bearing date on or about the ——— day of ——— respectively, become bound each to the other in the penal sum of £———; With conditions thereunder written, to obey and perform my award concerning all the matters in difference; so as the said award should be made in writing and ready to be delivered to the said parties in difference, or such of them as should require the same, on or before the ——— day of ——— then next.

of bonds, with conditions for performance of award.

Award

NOW KNOW YE that I, the said [*arbitrator*], having taken upon me the said award and arbitrament, and having been attended by the said parties and their respective solicitors, and having heard and considered the allegations and evidence of both the said parties and their witnesses concerning the premises, do hereby award as follows, that is to say:

of sum of money;

1. I award and determine that the said C. D. shall pay to the said A. B. on the ——— day of ——— next ensuing, the sum of £———.

and that each of the parties shall give to the other a general release:

2. I further award and determine that upon payment of the said sum of £——— to the said A. B. as aforesaid, they the said A. B. and C. D. shall respectively, at the cost of the party requiring the same, make and execute each unto the other of them releases in writing of all actions, causes of action, debts, controversies, claims, and demands whatsoever, up to the day of the date of the aforesaid obligations.

Costs.

3. I further award that the costs of the reference, including the costs of the preparation and execution of the said agreement of reference and of this award shall be borne and paid as to one moiety thereof by the said A. B., and as to the other moiety by the said C. D. [*or otherwise as the arbitrator may direct.*]

In witness whereof I, the said [*arbitrator*], the arbitrator

aforesaid, have hereunto set my hand the ——— day of ———, 18—.

Signed and published in the presence of us (*x*)

XXXIII. Award on general reference, for Payment, and Releases.

XXXIV. *AWARD that a* PARTNERSHP *be* DISSOLVED, *with consequent Directions.*

TO ALL TO WHOM THESE PRESENTS SHALL COME, I [*arbitrator*], of &c., send greeting. WHEREAS divers disputes and differences have arisen between A. B. and C. D. with reference to the business carried on by them in partnership under the style or firm of B. & Co., and with reference to their respective rights and liabilities under their articles of partnership, dated &c. AND WHEREAS by an agreement dated &c., and made &c., the said A. B. and C. D., agreed to refer all such disputes and differences to me as arbitrator, with power among other things to award that the said partnership should stand dissolved as from any day in the year 18— which I might fix by my award. NOW KNOW YE, that I, the said [*arbitrator*], having &c., do make this my award of and concerning the matters so referred to me as aforesaid, in manner following, that is to say:

Recital of disputes,

—and submission to arbitration.

Award

1. The said partnership shall be deemed to have been determined on, and shall stand dissolved from the ——— day of ———.

that partnership be dissolved:

2. The said A. B., his executors or administrators, shall and may have, and receive to his or their own use, without the interference of the said C. D., all debts due and owing to the said partnership, from any person whomsoever: And may use the name of the said C. D. in any action or proceeding to be commenced for the recovery of any such debt or demand.

that A. B. shall receive all the partnership debts; and may use C. D.'s name in any action or suit for recovery thereof:

3. The said A. B. shall pay and discharge all debts, demands, and claims whatsoever, due by, or which may be

that A. B. shall pay all demands on

(*x*) It seems generally prudent to have two witnesses to an award or umpirage, in order to prevent the trouble which would be caused in case a single witness should die, and it should afterwards be requisite to have an affidavit of the due execution, in order to ground a motion for an attachment.

It seems prudent to have two witnesses to an award.

XXXIV. Award for Dissolution of Partnership.

made against the said partnership, or the said C. D. in respect thereof: And shall indemnify the said C. D. from all such debts, demands and claims, and from any loss or damage that may be incurred or sustained by the said C. D., by reason of his name being used in any such action or proceeding as aforesaid.

the co-partnership;

and indemnify C. D. therefrom:

and from all damages by reason of his name being used:

4. The said C. D. shall, upon the request of the said A. B., his executors or administrators, deliver up to him or them all and every the books, papers, and writings, which may be in the custody, power, or possession of him the said C. D., in anywise relating to the business of the said partnership.

that A. B. shall, at a fixed time and place, pay a sum of money to C. D.

5. The said A. B. shall on the ——— day of ——— next, at the house of the said C. D., at ——— aforesaid, pay to the said C. D. the sum of £———. And the said C. D. shall accept the same sum in full satisfaction and discharge of all demands against the said A. B., until the day of the date of the said submission.

Costs.

6. I further award that the costs of this reference (*ante*, p. 226).

In witness, &c.

XXXV. *AWARD by Arbitrator respecting the* Estate and Effects of a Testator, *on a Submission by the* Executors, *and the* Persons interested, *as to* Testator's intention, Legatees' Claims, *and* Partnership Accounts (*a*).

Recital of deed of submission.

TO ALL TO WHOM these presents shall come, I [*arbitrator*], of &c., send greeting. Whereas in and by an indenture, bearing date &c., and made &c. (*recite terms of submission*, *ante*, p. 209).

Testatum.

NOW KNOW YE, that I, the said [*arbitrator*], having taken upon myself the charge of the said award, and having heard and considered the several allegations, vouchers and proofs brought before me by and on behalf of the said parties respectively, am of opinion,

That the testator's intention was, to give, devise,

That the intention of the said [*testator*], deceased, was, by will, to give, devise and bequeath the following legacies and property; namely, unto his widow, E. M., the interest or dividends arising from £———, three per centum

(*a*) For the submission above referred to see Precedent V., *ante*, p. 209.

XXXV. Award as to Testator's Intention, Legatees' Claims, and Partnership Accounts.

consolidated bank annuities; and the use of the household furniture, plate and utensils in and appertaining to the testator's house at ——— (valued at £———), during her life; And from and after her decease, the said annuities, household furniture, plate and utensils to be the property of and divided amongst his seven grandchildren, the above-named P. M. G., &c., by even and equal portions: Unto the said P. M. G., &c., all the interest or concern of the said [*testator*], deceased, in shipping, and the benefit to arise therefrom, share and share alike: Unto the said P. M. G. in fee simple the house then occupied by his father, the said E. G. the elder: Unto the said L. B. in fee simple the house then occupied by Mrs. X.: And unto the said E. G. the younger in fee simple the house then occupied by Mr. Y.; all which houses are situate in or near ——— Street, in the said parish of ———: Unto the said seven grandchildren the following specific legacies, or sums of money: that is to say: To the said P. M. G. and L. B. the sum of £——— each; to the said E. G. the younger, Jos. G., John G., P. A. and S. A., £——— each; And to his daughter the said E. A., the sum of £———; and also in fee simple the house and land situate in ——— aforesaid, then and now in the occupation of the said J. A.; together with his coach and horses. THEREFORE, we hereby appropriate and fix the aforesaid devises, legacies and bequests given and bequeathed, or intended to be given and bequeathed, to the said E. M., P. M. G., L. B., E. G. the younger, Jos. G., John G., P. A., S. A. and E. A. respectively, in and by the will of the said P. M., deceased, in manner above mentioned. AND we award and confirm the same to the said devisees and legatees, their heirs, executors, administrators and assigns respectively. AND we order and direct the said several devisees and legatees, and all and every person or persons claiming for, by, or from or under them, or any of them, to be and remain fully satisfied and contented with the sums and proportions of the estate, goods, chattels, and credits of the said [*testator*], deceased, hereinbefore specified, so far as relates thereto, or to any part thereof. AND we order and direct, that the said E. G., the elder, and J. A., as executors as aforesaid, shall pay to the said P. M. G., the sum of £———, in full of all claims and demands the said P. M. G., or his representatives, can or may have on the estate of the said [*testator*], deceased, for

and bequeath to several persons, certain legacies and property.

Award of legacies and property accordingly; and

that the legatees and devisees shall remain satisfied therewith;

that the executors shall pay P. M. G. a sum in full of all demands;

XXXV. Award as to Testator's Intention, Legatees' Claims, and Partnership Accounts.

the balance of account due to him as partner with the said late [*testator*] at the time of his decease: And we direct the said P. M. G. to receive the said sum accordingly: And we further award and order, that one moiety of the book debts due and owing to the said [*testator*], deceased, and the said P. M. G., as partners in trade, and which have been taken by the said P. M. G., at and for the sum of £———, shall be the property of the said P. M. G.; and that the remaining moiety thereof shall be the property of and divided among the said seven grandchildren of the said [*testator*], deceased: We also award unto the said E. A. all the household furniture and utensils that were in the house now occupied by the said J. A. at the decease of the said [*testator*], together with every article then in, upon, or in any wise belonging or appertaining to the said house and premises: And we further award and order, that all the rest, residue, and remainder of the estate, goods, chattels, and credits of the said [*testator*], deceased, shall be divided among his said seven grandchildren, the said P. M. G., &c. equally: And we likewise award and direct that the said E. G., the elder, and J. A., as executors as aforesaid, shall pay to the said P. M. G., one moiety of the said book debts; and to each of them the said P. M. G., &c. an equal portion of the other moiety of the said book debts; and also their respective proportion, or such part thereof as has not been already paid, of the interest or concern in shipping of the said [*testator*], deceased, pursuant to an agreement entered into between the said E. G., the elder, and J. A., his executors as aforesaid, and the said P. M. G., amounting, as appears by the said agreement, to the sum of £———; and we direct that the said agreement shall be finally confirmed; and also of such other part of the said shipping, or interest therein, of the said deceased, as has not been included in the said agreement; and likewise of the rest, residue, and remainder of his estate, goods, chattels, and credits, not otherwise disposed of in or by his last will and testament, as the same shall be from time to time collected, gotten in, and received by the said executors, to the amount of £———, or upwards: And we direct the said devisees and legatees respectively, and every other person claiming, or to claim, by, from, or under them, or any of them, from time to time, when lawfully required, to sign, seal, execute, and deliver good and sufficient releases,

that one half of book debts owing to testator and P. M. G., as partners, belongs to P. M. G.,

and other half to testator's seven grandchildren;

that all the furniture in a house at testator's death belongs to E. A.;

and that the residue of testator's estates shall be equally divided amongst P. M. G. and the testator's other grandchildren: that the executors shall pay P. M. G. one half of the book debts, and to the grandchildren the other half equally;

and their unpaid proportion of the shipping concern, pursuant to an agreement;

and also of such other part of shipping concern as is not included in agreement;

and of the residue of testator's estate, when received, to

acquittances, and discharges for all moneys paid or to be paid to them, by the said executors, by virtue of the said will, and of these presents. And we moreover award that the said E. G., the elder, and J. A., as executors as aforesaid, shall pay into the hands of Messrs. ———, the sum of £———, at or before the delivery of this our award, for charges of the present reference: And upon performance of this our award, all differences and disputes in anywise subsisting between the said parties, or any of them, previous to the day of the date of the said indenture, touching the premises, shall cease and determine. In witness, &c.

XXXV. Award as to Testator's Intention, Legatees' Claims, and Partnership Accounts.

the amount of £——: that devisees and legatees shall execute releases: that the executors shall pay expenses of reference: and that, on performance of award, all differences shall cease.

XXXVI. *AWARD that an* Intestate *was indebted to one of his Children,* 139*l.* 6*s.*; *that such Child is entitled to receive* 1,400*l. as his distributive Share of the Residue: that an Action shall cease: that, on Payment of the* 1,400*l. and Interest such child shall, if required, execute to the Administrators a* General Release.

TO ALL TO WHOM these presents shall come, I, [*arbitrator*], of &c., send greeting: Whereas A. B., late of &c., died on the ——— of ———, 18—, intestate, leaving three sons, C. B., D. B., and E. B., and no other children him surviving, and on ——— of ———, 18—, letters of administration of the estate and effects of the said A. B. were duly granted to the said D. B. and E. B.: And whereas the said A. B. was at the date of his death indebted to his son the said C. B., and questions arose between the said C. B. and D. B. and E. B., as to the amount of the said debt to the said C. B. and as to the share of the said A. B.'s estate to which he was entitled: And whereas the said C. D. instituted in the Chancery Division of the High Court of Justice an action against the said D. B. and E. B. for the administration of the estate of the said A. B.: And whereas it has been agreed by and between the said C. B., D. B., and E. B. that all the said questions should be referred to me as arbitrator. NOW KNOW YE, that I, the said [*arbitrator*] having &c., do make this my award as follows; that is to say:

Recital of intestacy; of questions having arisen; of action having been commenced; of agreement to refer.

XXXVI. **Award on Intestacy, of Debt, and Distributive Share.**

1. I award and declare, that the said A. B. was, at the time of his death, indebted to the said C. B. in the sum of 139*l.* 6*s.*

Award that intestate was indebted to C. B.;

2. I further award and declare that the said C. B. as one of the three children of the said A. B., is entitled to receive the sum of 1,400*l.* as his share of the clear residue of the personal estate and effects of the said A. B., left after payment of all the debts of the said A. B., including the said sum of 139*l.* 6*s.*

that C. B. is entitled to receive 1,400*l.* as his distributive share of the residue;

3. I further award and direct, that the said action shall be stayed, and no further prosecuted: And that the said D. B. and E. B., as such administrators as aforesaid, shall, on or before the ——— day of ———, pay to the said C. B. the said debt or sum of 139*l.* 6*s.*, and also the said sum of 1,400*l.*, together with interest for the same respectively, at the rate of 4*l.* per centum per annum, as from the ——— day of ———: And I further award and direct that, upon payment of the said sums, with such interest as aforesaid, the said C. B. shall, if thereto required, execute to the said D. B. and E. B., at their costs and charges, a general release of all claims and demands, upon or in respect of the personal estate of the said A. B. (*Add award as to Costs, ante*, p. 226.) In witness, &c.

that action shall be stayed;

that the administrators shall pay C. B. the 1,400*l.*, with interest;

that, on payment, release shall be executed.

XXXVII. *AWARD that a Sum is due to a* Solicitor; *that he has a* Lien *upon the Client's Papers for it, &c.*

[*After formal parts and recitals, continue:*]

Award that a sum is due to a solicitor;

NOW KNOW YE, that I, the said [*arbitrator*], having taken, &c., hereby award and adjudge that, at the date of the said submission, there was, and now is, due and owing to the said A. B. by the said C. D., for and upon the several matters referred to me as aforesaid, the sum of £———, and no more: And I further award, that the said A. B. has a lien (*y*) upon all deeds, papers, and writings in

that he has a lien upon the client's

A solicitor has a general lien on all papers, excepting

(*y*) A solicitor has a lien on all papers delivered to him in that character, not only for professional business in the matter of the papers, but for all professional business whilst

XXXVII. Award between Solicitor and Client.

the custody or possession of him the said A. B., belonging or relating to the affairs of the said C. D. for the payment of the said sum of £———: (*Add award and order that C. D. pay, on &c., at &c., the said sum of* ———, *&c.*, ut ante, p. 228.) And I do further award and order, that the said A. B. shall receive from the said C. D. the said sum of £———, and shall accept the same in full satisfaction of all demands for such business done and money due, paid, laid out, and expended, as is hereinbefore mentioned. In witness, &c.

papers for the sum;

that the sum be paid, and accepted in full of all demands for business referred.

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they remain in his hands: *Lord* v. *Wormleighton*, Jac. 580; *Re Moss*, L. R., 2 Eq. 345.

what he receives in another character.

The Court will not, however, allow a solicitor to assert his lien in such a way as to embarrass the proceedings in an administration action: *Belaney* v. *Ffrench*, L. R., 8 Ch. 918; *Re Boughton*, 23 Ch. D. 169.

A solicitor has no lien, as solicitor, on papers which he receives as steward of a manor: *Champernown* v. *Scott*, 6 Madd. 93; *Balch* v. *Symes*, Turn. & R. 87; *R.* v. *Sankey*, 6 Nev. & M. 839; *vide ante*, Vol. I., p. 811.

A solicitor who refused to allow a deed in his possession to be proved on behalf of the plaintiff, because he had a lien on it for costs due from the defendant, was ordered to produce the deed at his own expense, and to pay all the costs consequent on his refusal: *Brassington* v. *Brassington*, 1 Sim. & Stu. 455.

Drafts, &c. of deeds, the property of the clients.

It has been decided that a solicitor is not entitled to retain the drafts and copies of deeds prepared by him, but is bound to deliver them up to the client who has paid for them: *Ex parte Horsfall*, 7 B. & C. 528. And on this principle, *Leach*, V. C., refused to order the papers of a partnership firm of solicitors, one partner in which had become bankrupt, to be delivered up to the solvent partner by the assignees; his Honor observing, that he had no right to order the papers of the clients to be delivered to one of the partners, without the consent of the clients: *Davidson* v. *Napier*, 1 Sim. 297. But a solicitor is entitled to retain original letters written to him by his client, and also copies of his own letters in his letter book, after the client has transferred the matter, to which the letters refer, to another solicitor: *Re Wheatcroft*, 6 Ch. D. 97; see also *Re Thomson*, 20 Beav. 545. See further, as to solicitor's lien on deeds and papers, *infra*, tit. Mortgages. A solicitor's lien on a fund in Court is not general, but is confined to the costs of the particular suit: *Bozon* v. *Bolland*, 4 My. & Cr. 354. As to a solicitor's lien for costs in respect of "property recovered or preserved," see stat. 23 & 24 Vict. c. 127, s. 28.

No general lien on fund in Court.

XXXVIII. *AWARD of a* Sum *to be taken in full* Satisfaction *of all* Claims, *and for Execution of a* General Release.

[*After formal parts and recitals, including recitals of an Action and of an Order of Reference, continue :*]

Award that a certain sum be paid;

and received in full satisfaction of matters referred;

NOW KNOW YE, that I the said [*arbitrator*], having, &c., hereby award, and adjudge, that the said C. D. shall pay to the said A. B., on the ——— day of ———, at &c., the sum of £———: And that the same shall be received by the said A. B. in full satisfaction and discharge of and for all the matters in difference to me referred as aforesaid: And that upon payment thereof, the said A. B. shall, if required so to do, by and at the costs of the said C. D., execute and deliver to him the said C. D., a general release in writing, of all and all manner of action and actions, cause and causes of action, debts, duties, claims, and demands whatsoever, in anywise subsisting or depending between the said A. B. and C. D. previous to the day of the date of the aforesaid order: And I do further award and order that each of the said parties shall and do bear and pay his own costs of the said action and of this reference: And that the costs of this my award be paid in equal moieties between them. In witness, &c.

that each party pay his own costs of action and reference;

and that the costs of award be paid equally.

XXXIX. *AWARD of Two Arbitrators* (*the third dissenting*) *under an Arbitration* Clause in a Ship-building Contract, *and* under an Order of Court *in an Action for* Non-delivery of a Ship.

Recital of agreement to build ship;

TO ALL TO WHOM these presents shall come. We, G. H., of &c., and J. K., of &c., send greetings. Whereas by an agreement, dated the —— day of ——, and made between A. B. & Co., of &c., of the one part; and C. D., of &c., of the other part; The said A. B. & Co. agreed to build for the said C. D. two vessels and engines as therein mentioned, which should be ready for delivery afloat by the ——— day of ———, 18—, for the price of £———, to be paid by certain instalments as therein provided: And whereas the said agreement, amongst other things, provided that any dispute arising between the parties during or after the construction of the vessels, engines, boilers and machinery should be referred to the arbitration of two persons, to be appointed by the parties respectively, and of one other person, to be appointed

of arbitration clause;

XXXIX. Award under Arbitration Clause in Contract and Order of Court.

by the two so appointed, the decision of any two to be binding; and that all the provisions of the Common Law Procedure Act, 1854, relating to arbitrations, should apply to the said agreement; and that the costs of such reference, and of the arbitrators and award, should be in the discretion of the arbitrators, or any two of them; and that the arbitrators, or any two of them, should be at liberty to make one final award, or one or more interim awards, until a final award should be made, and to make their award at any time without reference to time; and it was thereby also provided that the submission thereby made might be made a rule of any of Her Majesty's Courts of Record: AND WHEREAS the said C. D. on the ——— day of ———, 18—, commenced an action in the Queen's Bench Division of Her Majesty's High Court of Justice against the said A. B. & Co., in which the said C. D. claimed the delivery of the ——— (being one of the two vessels contracted for as aforesaid, the other vessel having been delivered and paid for), and also claimed damages for breach of the said agreement: AND WHEREAS the statement of claim in the said action was delivered on the ——— day of ———, 18—: AND WHEREAS, on the ——— day of ———, 18—, upon the hearing of a summons issued by the said C. D., calling upon the said A. B. & Co. to show cause why the said A. B. & Co. should not (upon certain terms therein mentioned) deliver to the said C. D. the said vessel, it was by and with the consent of the said parties and their respective counsel and solicitors, ordered that, upon payment of £——— by the said C. D. to the said A. B. & Co., the said vessel should be delivered by the said A. B. & Co. to the said C. D. on or before the ——— day of ———, 18—, the said C. D. taking such vessel as she was, and making no claim for damages except for delay, and that the damages for delay should be referred under the contract, the said A. B. & Co. to be at liberty, if they should think fit, to put forward on the arbitration any claim they might think proper for extras beyond the £———, the said C. D. denying that there was any such claim, the arbitrators to decide whether there was or not, and that the costs of the said action should be in the discretion of the arbitrators. AND WHEREAS the said C. D. has paid the said sum of £———, to the said A. B. & Co., and has obtained possession of the said vessel: AND WHEREAS by an agreement

of commencement of action;

of delivery of statement of claim;

of order for reference of matters in dispute;

of delivery of ship.

of agreement

XXXIX. Award under Arbitration Clause in Contract and Order of Court.

made the ——— day of ———, 18—, between the said A. B. & Co., of the one part, and the said C. D., of the other part, it was agreed by and between the said parties, for the purpose of carrying out the aforesaid terms of reference, that

for conduct of the reference;

the claim of the said C. D. for damages for the delay on the part of the said A. B. & Co. (which they did not admit) should be referred to the arbitration and award of E. F., of &c., as arbitrator on the part of the said A. B. & Co., and of G. H. as arbitrator on the part of the said C. D., and a third arbitrator, to be appointed by the said two arbitrators, with the liberty to the said A. B. & Co. which was given to them by the said order of the ——— day of ———, 18—, to put forward, if they should think fit, on the arbitration, any claim they might think they had for extras beyond the £———, the said C. D. denying that there was any such claim, and the arbitrators to decide whether there was or not; and that the decision of any two of the arbitrators should be binding, and that the said arbitration should proceed as provided by the said clause of the contract, and that the costs of the said action, as well as of the reference and of the arbitrators, and award should be in the discretion of the arbitrators, or any two of them; and that nothing in the agreement now in recital should prejudice or affect the said order of the ——— day of ———, 18—, and that the said submission might be made a rule of the Queen's Bench Division of Her Majesty's High Court of Justice: And whereas the said E. F., as arbitrator on the part of the said A. B. & Co., and the said G. H., as arbitrator on the part of the said C. D., failed to agree upon, and did not appoint, a third arbitrator, in pursuance of the said agreement of the ——— day of ———, 18—: And whereas the said C. D., in accordance with the provisions of the Common Law Procedure Act, 1854, served on the ——— day of ———, 18—, the said E. F. and G. H., with a notice in writing whereby they were thereby required to appoint, in pursuance of the said agreement of the ——— day of ———, 18—, the third arbitrator to the said arbitration and award, and that unless within ——— days after the service of the notice they should appoint such third arbitrator, proceedings would be taken for procuring the appointment of the said third arbitrator by a judge, as by the Common Law Procedure Act, 1854, is prescribed in that behalf: And whereas, on the ——— day of ———, 18—, upon the

that arbitrators appointed failed to appoint a third arbitrator;

of service of notice on them to make such appointment;

of order appointing third arbitrator;

XXXIX. Award under Arbitration Clause in Contract and Order of Court.

hearing of a summons taken out by the said C. D., after the expiration of ——— clear days from the service of the above notice, no such third arbitrator having been appointed by the said A. B. & Co., as therein required, it was ordered by the Court that, pursuant to the said submission of the ——— day of ———, 18—, and pursuant to the Common Law Procedure Act, 1854, J. K. should be appointed the third arbitrator in the said reference: And whereas the said E. F. does not agree with the conclusions arrived at by the said G. H. and J. K. NOW WE, the said G. H. and J. K., having taken upon ourselves the burthen of this reference, and having duly weighed and considered the several allegations of the said parties, and also the proofs, vouchers, and documents, which have been given in evidence before us, do hereby make and publish our award in writing of and concerning the matters referred to us in manner following, that is to say:

that one of the arbitrators dissents from conclusion of the other two.

Award:

1. We award and adjudge that the said C. D., the plaintiff, is not entitled to recover any damages from the said A. B. & Co., the defendants, in respect of the claim for delay on the part of the said defendants, and that the defendants are not entitled to recover anything from the plaintiffs in respect of their claim for extras.

as to claim for damages;

2. We do also further award and direct that the defendants do pay to the plaintiffs the costs of the proceedings to obtain delivery of the said vessel, and that each party do bear his own costs of the reference, and pay half the costs of the award.

as to costs.

In witness, &c.

XL. *AWARD under Rule of Court for* Stay of Proceedings, Payment of Money, *and Collection of* Partnership *Debts.*

[*After formal parts and recitals, continue:*]

NOW KNOW YE that we, the said arbitrators, having taken upon ourselves the burthen of the said reference, and having examined and duly considered the allegations, vouchers, proofs, and witnesses of the said parties respectively, make and publish this our award in writing of and concerning the matters to us referred, as follows: that is to say; We

Testatum.

Award that

XL. Award for Stay of Proceedings, Payment of Money, and Collection of Partnership Debts.

award and direct, that all proceedings in the said action shall cease, and be no further prosecuted: And that the said [*defendant*] shall pay to the said [*plaintiff*], on the ——— day of ——— next, the sum of £———, which sum we adjudge and declare to be due from the said [*defendant*] to the said [*plaintiff*], for and in respect of the matters contained in the declaration in the said action: And we do further award and direct that the said [*defendant*] shall permit and suffer the said [*plaintiff*] to collect and receive, for their joint use, the several debts and sums of money following; that is to say, (*state the names of the debtors, and the amount of their respective debts*): And we do further award and direct that the said (*plaintiff*) shall use his utmost endeavours to collect and receive the said several debts and sums of money accordingly: And that the said [*plaintiff*] shall be at liberty to bring any action or actions, either in his own name, or in the name of the said [*defendant*], or in their joint names, as he may be advised, for the recovery of any debt or debts, sum or sums of money, hereinbefore mentioned; But nevertheless, if the said [*plaintiff*] should bring any action in the name of the said [*defendant*], without his consent for that purpose first had and obtained, that then the said [*plaintiff*] shall indemnify the said [*defendant*] from all consequences, costs, charges, and expenses attending any such action: And we further award and direct that the said [*plaintiff*] shall not compound or compromise any action to be brought for the recovery of any of the said debts or sums of money, without the consent of the said [*defendant*], in writing, for that purpose first had and obtained: And that the said [*plaintiff*] shall, within one month after payment of the said sum of £———, deliver to the said [*defendant*] an account of the place of residence of all persons indebted to them, the said [*plaintiff*] and [*defendant*], so far as the said [*plaintiff*] shall know, or be able to ascertain the same: And shall give to the said [*defendant*] an account of his proceedings, from time to time, within six weeks after any request in writing so to do: And shall also, from time to time, as the same debts are respectively received, pay to the said [*defendant*], one moiety thereof (all reasonable expenses touching the collecting and recovering of such debts being first deducted): And lastly, we do award and direct that each of the said parties shall and do bear his own costs of the said action and [*as to costs*]. In witness, &c.

proceedings in the action shall cease;

that defendant shall pay plaintiff a certain sum:

that plaintiff collect debts;

that the plaintiff may bring actions in the name of defendant,

indemnifying defendant from costs;

plaintiff not to compromise any action, without defendant's consent;

plaintiff to deliver an account of the residences of all persons indebted;

and give defendant an account of his proceedings;

and as debts are received, pay defendant a moiety;

award as to costs of action and of reference.

XLI. *AWARD under an* ORDER OF NISI PRIUS AT THE ASSIZES, *that the* VERDICT *found for the Plaintiff do stand, &c.*

TO ALL TO WHOM THESE PRESENTS SHALL COME, I, [*arbitrator*], of the Inner Temple, Barrister-at-Law, send greeting. WHEREAS in an action wherein [*plaintiff*] was the plaintiff and [*defendant*] and [*other defendant*] were the defendants, came on to be tried at the Assizes holden at ———, in and for the county of ———, on ——— the ——— day of ———, in the ——— year of the reign of her present Majesty Queen Victoria, before the Honourable Sir A. B. and the Honourable Sir C. D., two of the Justices of the High Court of Justice, being the Justices of our Lady the Queen appointed to take the Assizes for the said county of ———, according to the form of the statute in that case made and provided, It was ordered by the Court, with the consent of the said parties, their counsel and solicitors, that a verdict should be entered for the plaintiff, damages £———, costs forty shillings; But that such verdict should be subject to the award, arbitrament, and determination of me the said [*arbitrator*], who was by the same order empowered to direct that a verdict should be entered for the plaintiff or the defendants, as I should think proper; and to whom it was thereby referred to decide the said action and settle all matters in difference between the said parties; and to order and determine what I, the said [*arbitrator*], should think fit to be done by either of them, respecting the matters in dispute: so as I, the said [*arbitrator*], should make and publish my award in writing, concerning the premises, on or before the second day of the then next Michaelmas Term; AND it was also ordered, that the costs of the said cause should abide the event of my said award: And that the costs of this present reference and award should be in the discretion of me, the said [*arbitrator*], who might direct and award to and by whom, and in what manner, the same should be paid: AND WHEREAS I, the said [*arbitrator*], by writing under my hand, dated, &c., and endorsed on the said order, enlarged my time for making my award until ——— the ——— day of this instant November. NOW KNOW YE, that I, the said [*arbitrator*], having taken upon myself the burthen of the said

Recital of order of Nisi Prius;

verdict for plaintiff, subject to reference;

which provided that the costs of the cause should abide the event of the award;

that the costs of the reference should be in the discretion of the arbitrator;

Recital of enlargement of time for making award.

Testatum.

XLI. **Award under Order of Nisi Prius.**

reference, and having heard and duly considered the allegations, vouchers, proofs, and witnesses of the said parties, Do make and publish this my award, of and concerning the matters to me referred, as follows: that is to say, I award and order, that the verdict so found for the plaintiff, as aforesaid, shall stand and be in force: And I further award and adjudge, that the defendants have not any claim or demand upon the said plaintiff, in respect of, or in any manner relating to, the vessel called the ——— in the statement of claim in the said action mentioned: And that the defendants shall pay to the plaintiff the costs of this reference and award, to be taxed by the proper officer of the same Court. In witness, &c.

Award that verdict found for plaintiff do stand;

that defendants have no claim on plaintiff in respect of a vessel mentioned in pleadings;

that defendants pay costs of reference and award.

XLII. *AWARD under an* Order of Nisi Prius, *that the* Cause *shall cease; that the Defendant shall pay the Plaintiff a Sum for* holding over *after the Expiration of the Lease; and a further Sum for* Breach of Covenants *in not repairing.*

[*After formal parts and recitals, continue:*]

NOW KNOW YE, &c. I award, and direct, that the said cause shall cease, and be no further prosecuted; And that the said [*defendant*] shall pay to the said [*plaintiff*], on the ——— day of ——— next, the sum of £———, for the use and occupation, and as the value of the said premises, during the time the same were held over after the expiration of the said lease; and the further sum of £———, for and on account of the breach of the said covenants, so far as concerns the supporting, maintaining, keeping and leaving in repair the dwelling-houses and other buildings erected and standing on the said premises at the date of the said lease, or erected and built thereon during the said term for habitation: And I further award and direct that the said [*defendant*] shall pay to the said [*plaintiff*] all his costs of the said action to be taxed by the officer of the Court, and shall also pay to the said [*plaintiff*] the costs incurred by the said [*plaintiff*] of and incident to the reference and the costs of this award, [and I assess the plaintiff's costs at £——— in respect of the reference, and the costs of the award at £———]. In witness, &c.

Award, cause to cease;

defendant to pay plaintiff a sum for holding over;

and a further sum for breach of covenants.

Costs of action, reference, and award.

Assessment of costs of reference and award.

XLIII. *AWARD under an Order of Nisi Prius, that the* PLAINTIFF *has no* CAUSE *of* ACTION.

[*After formal parts and recitals continue:*]

NOW KNOW YE, &c. I award, adjudge, and determine, that, at the time of commencing the said suit, the said [*plaintiff*] had no cause of action whatever against the said [*defendant*], in respect of the said matters to me referred: AND I thereupon award, and direct that instead of the said verdict and damages so found for the said [*plaintiff*], a verdict in the said action be entered for the said [*defendant*]. AND I further award, and direct [*as to costs, see ante*, pp. 226, 240]. IN WITNESS, &c.

Testatum.

Award that the plaintiff had no cause of action;

that, instead of verdict and damages for plaintiff, a verdict be entered for defendant.

XLIV. *AWARD of* UMPIRE *as to* COMPENSATION *in respect of* LANDS *taken by a* RAILWAY COMPANY.

TO ALL TO WHOM THESE PRESENTS SHALL COME, I [*umpire*], of &c., send greeting. WHEREAS under or by virtue of the ——— Railway Act, 18—, and the Public Acts incorporated therewith, the ——— Railway Company (hereinafter referred to as the Company) are empowered to take for the purposes of the railway and works authorized by their said Act certain lands and hereditaments situate in the parish of ———, in the county of ———, and particularly described in the schedule hereunder written and delineated in the map or plan hereunto annexed, and therein coloured ———: AND WHEREAS, on or about the ——— day of ——— last, the Company duly gave notice in writing to [*landowner*], of &c., the owner of the lands and hereditaments described in the said schedule, that they required to take the same for the purposes of the said railway and works, and that they were willing to treat for the purchase of the said lands and hereditaments, and as to the compensation to be made to the said [*landowner*] for the damage that might be sustained by him by reason of the execution of the works of the said railway: AND WHEREAS the said [*landowner*], by a notice in writing, dated &c., claimed the sum of £——— as compensation for the value of the said lands and hereditaments, and for such damage as aforesaid: AND WHEREAS the said Company offered to pay to the said [*landowner*] the sum of £——— as such compensation as aforesaid, and have

Recitals: that company were authorized to take the lands;

of notice by company of lands required;

of notice by landowner of claim for compensation;

of compensation offered by company;

XLIV. Award of Umpire in respect of Lands taken by Railway Company.

made no other offer: AND WHEREAS the said [*landowner*] by a notice in writing, dated &c., and delivered to the Company before their warrant had been issued to the sheriff to summon a jury in respect of the said lands and hereditaments, signified his desire to have such compensation settled by arbitration: AND WHEREAS the Company, by an instrument in writing, under the hand of their secretary, dated &c., appointed [*arbitrator*], of &c., to be the arbitrator on their part to whom the dispute as to such compensation as aforesaid should be referred: AND WHEREAS the said [*landowner*], by an instrument in writing, dated &c., appointed [*arbitrator*], of &c., to be the arbitrator on his part to whom the said dispute should be referred: AND WHEREAS the said [*arbitrator*] and [*arbitrator*], before entering upon the matters referred to them as aforesaid, by an instrument in writing, dated &c., appointed me, the said [*umpire*], to be the umpire in the matter of the said arbitration: AND WHEREAS the said [*arbitrators*], by an instrument in writing, dated &c., duly appointed an extended time for the making of their award, namely, until the ——— day of ——— 18—: AND WHEREAS the said [*arbitrators*] disagreed respecting the matters referred to them, and by reason of such disagreement failed to make their award on or before the said ——— day of ——— 18—, whereby the matters referred to the said [*arbitrators*] came before me as umpire for determination. NOW KNOW YE that I, the said [*umpire*], having taken upon myself the burthen of the said reference, and having, before entering upon any of the matters referred to me, duly made, and subscribed before a justice duly authorized in that behalf the declaration required by the said Acts, which said declaration is hereunto annexed, and having been attended by the parties and their witnesses, and having viewed the said lands and hereditaments, and having inquired into and fully considered the said matters in dispute and connected therewith, Do make this my award in manner following (that is to say):

of notice by landowner of demand of arbitration;

of appointment by company of arbitrator;

of appointment by landowner of arbitrator;

of appointment by arbitrators of umpire;

of extension of time for making award;

of disagreement of arbitrators.

Award.

Determination of landowner's interest.

1. I find and determine that the said [*landowner*] is entitled to the said lands and hereditaments specified in the schedule hereto, in fee simple in possession.

Award of compensation.

2. I AWARD and direct that the Company shall pay to the said [*landowner*], his executors or administrators, the sum of £——— for and in respect of the value of the said lands and hereditaments so to be taken as aforesaid, and for all damage which may be sustained by the said [*land-*

owner] by the severing of the said lands and hereditaments from the other lands of the said [*landowner*], and by the otherwise injuriously affecting such other lands by the exercise by the Company of the powers contained in the said Acts.

XLIV. Award of Umpire in respect of Lands taken by Railway Company.

3. I hereby award and assess the costs of the said [*landowner*] of and incident to this arbitration at the sum of £———, and the costs of and incident to this my award, at the sum of £———. In witness, &c.

Costs.

The Schedule above referred to.

Declaration (*a*).

XLV. *AWARD as to* Compensation *for Land, &c., taken by a* Corporation, *wherein the* Arbitrator states a Case *for the* Opinion *of the* Court.

TO ALL TO WHOM these presents shall come, I, [*arbitrator*], of, &c., send greeting. Whereas by an instrument in writing dated the ——— day of ———, 18—, and made in the matter of the Corporation of the Borough of ——— (hereinafter called the said Corporation), and in the matter of the purchase by the said Corporation of lands of A. B., of &c., Esquire (hereinafter called the said owner), for the purposes of &c., and under the hand of the said A. B., and under the common seal of the said Corporation, After reciting [*recite special Act authorizing construction of waterworks, &c.*], and after reciting that the said owner and the said Corporation had determined in respect of all questions of disputed compensation to concur, pursuant to the Lands Clauses Consolidation Act, 1845, in the appointment of a single arbitrator to settle and determine and award the purchase-money or respective purchase-monies and compensation or respective compensations under the said Acts to be paid by the said Corporation for the purchase by them free from incumbrances (other than customary rents and services) of the fee simple and inheritance in possession of and in all freehold estates and of all estates of inheritance according to the custom of any manor of and in all customary hereditaments, lands, stints and rights respectively described and comprised in the claim of the said owner (of which

Recital of submission;

(*a*) As to the declaration to be annexed to the award, see stat. 8 & 9 Vict. c. 18, s. 33.

XLV. Award stating Case for opinion of Court.

a copy is annexed to the instrument now in recital), dated the ——— day of ———, 18—, delivered by him in pursuance of the notice to treat served by the said Corporation (of which a copy is also annexed to the instrument now in recital), and for the damage that might be sustained by the said owner by reason of the execution of the works authorized by the first above-mentioned Act, it being the intent of the said notice to treat of the said claim, and of the submission now in recital, that the said owner should sell and the said Corporation should acquire not only the life estate of the said owner, but all such estate and interest as by the 7th section of the Lands Clauses Consolidation Act, 1845, or otherwise, the said owner was authorized to sell and convey: And whereas copies of the said notice to treat and claim, respectively annexed to the said recited instrument, are also respectively annexed to or written under these presents, and constitute the first and second schedules hereunto respectively: And whereas I the said [*arbitrator*] took upon myself the said reference, and previously to entering upon the matters referred to me as aforesaid made and subscribed the declaration hereunto annexed: And whereas, by divers instruments under the hand of the said owner, and the seal of the said Corporation respectively, the time for making my award in the said matters in difference has been enlarged to the ——— day of ———, 18—: And whereas upon the consideration of the said matters in difference it appeared that the hereditaments mentioned and described in the first schedule to the said notice of claim were hereditaments claimed by the said owner as tenant for life, and that hereditaments mentioned and described in the second schedule to the said notice of claim were hereditaments claimed by the said owner for an estate of inheritance in fee simple in possession as to hereditaments described as being of freehold tenure, and for a customary estate of inheritance in possession as to hereditaments described as being of customary tenure, and I propose accordingly to award separately in respect of the respective hereditaments mentioned and described in such schedules to the notice of claim respectively: And whereas it also appeared that the said freehold hereditaments or parts thereof were formerly of copyhold or customary tenure, and are subject to reservations in favour of the lord of the manor of certain mines, minerals, rights, royalties and franchises specified in the indenture of the

that notice to treat and claim are set out in schedules to award;

that arbitrator entered on the reference, and made declaration;

of enlargement of time;

of nature and effect of claim;

of nature of the property;

XLV. Award stating Case for opinion of Court.

——— day of ———, 18—, mentioned in the first schedule to the said notice of claim, or as to others of such freehold hereditaments in some other instrument of enfranchisement: And whereas upon the consideration of the said matters in difference the said owner claimed that the stints mentioned in the third and fourth schedules respectively to the said notice of claim were stints or cattle-gates constituting several tenements or interests in the soil (the ownership of the soil being in the stint owners), and the said owner claimed to be entitled to such stints accordingly, but the said Corporation alleged that the said stints amounted only to rights to take the herbage of common or fell by the mouths of cattle or sheep, such rights being enjoyed as appendant or appurtenant to certain other tenements of the said owner (the ownership of the soil of the common or fell being in the lord of the manor, subject to such rights of pasturage): And the said owner also claimed the bed of the lake, being the lots mentioned last in the third and fourth schedules to the notice of claim respectively, and being in effect the lake called ———, such claim extending *ad medium filum* wherever the lands mentioned and described in the schedules to the said notice of claim were on one side only of the lake, and extending all the way across the lake wherever the said lands were on both sides of the lake, but the said Corporation disputed such claim: And whereas I am advised that the aforesaid claims relating to the said stints and to the bed of the said lake involve questions of title which is not for me to determine, and I have accordingly awarded separately, with a view to such questions being determined by competent authority: And whereas upon the consideration of the said matters in difference it appeared that certain stints had been omitted by mistake from the fourth schedule to the said notice of claim, but by consent of the parties it was agreed that I should award in respect thereof notwithstanding such omission: And whereas upon the consideration of the said matters in difference, the said owner made a claim to compensation in respect of water collected, diverted or impounded upon the said lands mentioned and described in the said schedules to the notice of claim and in respect of the natural or peculiar adaptation of such lands for collection of water or as a suitable site for the construction of a reservoir, and I propose to state the fact relating thereto in the form of

as to stints, &c.;

as to bed of lake;

that such claims involve questions of title not matter of the reference:

as to collection, diversion &c. of water.

XLV. Award stating Case for opinion of Court.

a special case as hereinafter appearing: And whereas the third schedule hereto contains an enumeration of certain documents which upon the consideration of the said matters in difference were put in evidence by counsel for the said Corporation, and which are herein entered only in consequence of the request of such counsel: And whereas the map or plan hereto annexed is a copy of the parliamentary plan used upon the consideration of the said matters in difference.

Award:

NOW KNOW YE and these presents witness, that I the said arbitrator, having fully and deliberately considered the said matters in difference, Do make this my award in writing in manner following, that is to say:—

as to amount of compensation for lands, &c.;

1. I award and determine that the sum of £——— is the value of the lands, hereditaments, stints, and rights described and comprised in the first and third schedules to the said notice of claim, including such mines and minerals, if any, as the said owner can sell; and I award and determine that the sum of £——— is the value of the lands, hereditaments, stints and rights, described and comprised in the second and fourth schedules to the said notice of claim, including such mines and minerals, if any, as the said owner can sell, and which respective lands, hereditaments, stints and rights are respectively required by the said Corporation; and I award and determine that the same sums of £——— and £———, shall respectively be paid by the said Corporation to the said owner for the purchase by them, free from incumbrances (other than the said reservations to the lord of the manor affecting the said freehold hereditaments or parts thereof, but which reservations I consider and hereby find to be of no value, and other than customary rents and services) of the fee simple and inheritance in possession of and in all freehold estates, and of all estates of inheritance according to the customs of any manor, of and in all customary hereditaments, lands, stints and rights respectively described and comprised in the said claim of the said owner, dated the ——— day of ——— 18—, and for the damage that may be sustained by the said owner, by reason of the execution of the works authorized by the first above-mentioned Act, but this my award and determination is subject as hereinafter mentioned or appearing.

as to stints;

2. I have, in my said award and determination, valued the said stints according to their value as rights to take

XLV. Award stating Case for opinion of Court.

the herbage of common or fell by the mouths of cattle or sheep, such rights being enjoyed as appendant or appurtenant to certain other tenements of the said owner (the ownership of the soil of the common or fell being in the lord of the manor, subject to such rights of pasturage); And I hereby award and determine for or in respect of the further or additional value of such stints, considered as stints or cattle-gates, constituting several tenements or interests in the soil (the ownership of the soil being in the stint owners), the further sum of £———, in respect of the stints mentioned in the third schedule to the said notice of claim, and £——— in respect of the stints mentioned in the fourth schedule to the said notice of claim, the same sums of £———, and £———, to be paid by the said Corporation to the said owner for the purchase by them of such stints, in addition to the respective sums to be paid by the said Corporation as hereinbefore awarded.

as to lake;

3. I have, in my said award and determination, valued the portions comprised in the said claim of the said lake, known as ———, in respect of the value of the water only of the said lake to the owner of the lands mentioned respectively in the first and second schedules to the notice of claim, and adjacent to the said lake as riparian owner, and not in respect of any right to the bed of the said lake: And I hereby award and determine that the further sum of £——— is the value of the bed of the said lake adjacent to the said lands and hereditaments, such bed extending *ad medium filum* wherever such adjacent lands and hereditaments are on one side only of the lake, and extending all the way across the lake wherever such adjacent lands and hereditaments are on both sides of the lake; And I hereby apportion such sum of £——— in the proportion or sums of £——— for the portion of the lake mentioned in the first schedule to the notice of claim, and £——— for the portion of the lake mentioned in the second schedule to the notice of claim; And I award and determine that the same sums of £——— and £——— shall respectively be paid by the said Corporation to the said owner for the purchase by them, free from incumbrances (other than customary rents and services, if any), of the fee simple and inheritance in possession, or customary fee simple and inheritance in possession, as the case may be, of the said adjacent bed of the lake, and for the damage that may be sustained by the said owner

XLV. Award stating Case for opinion of Court.

in respect of the said bed by reason of the execution of the works authorized by the first above-mentioned Act.

as to stints omitted from claim.

4. And so far as I lawfully can or may, I hereby award and determine that the value of the stints so far as aforesaid omitted by mistake from the fourth schedule of the notice of claim is the sum of £———, according to their value as mere rights of taking the herbage of common or fell by the mouths of cattle or sheep, such rights being enjoyed as appendant or appurtenant to other tenements of the owner (the ownership of the soil of the common or fell being in the lord of the manor, subject to such rights of pasturage), and that the further sum of £——— is the further or additional value of such stints considered as several tenements, including the ownership of the soil, such sum of £———, and, in case the stints are to be considered as several tenements as aforesaid, such further sum of £——— to be paid by the said Corporation to the said owner for the purchase by them of such stints, in addition to the respective sums to be paid by the said Corporation as hereinbefore awarded.

Special case.

And by way of special case for the opinion of the High Court of Justice,

5. I hereby state, and find as facts, that the lands and hereditaments respectively described and comprised in the said claim of the said owner have by themselves, and in conjunction with other adjoining lands, a natural and peculiar adaptation for the collection, diverting and impounding of water, and as a suitable site for the construction of a reservoir.

6. I have in my awards and determinations hereinbefore contained, in estimating the value of the land, taken into consideration its enhanced value by reason of the water that may be collected, diverted and impounded upon the said lands and hereditaments of the said owner, and also by reason of its natural and peculiar adaptation for the construction of a reservoir, but I have not allowed for or included any sum in respect of the enhanced value of the land by reason of its natural and peculiar adaptation in conjunction with other adjoining lands for the collection, diverting and impounding of water, and as a suitable site for the construction of a reservoir: And I hereby submit for the opinion of the Court whether or not I ought to have allowed for and included any sum in respect of such last-mentioned enhanced value.

XLV. Award stating Case for opinion of Court.

7. If the Court shall be of opinion that I ought to have allowed for and included a sum in respect thereof, then I hereby award and determine such sum to be the further sum following, that is to say: If upon the determination of the question of title it shall appear that the said bed of the said lake adjacent to the other lands described and comprised in the claim of the said owner forms part of the hereditaments to be purchased as aforesaid by the said Corporation from the said owner, then the sum of £———; but if it shall appear that the said adjacent bed of the lake does not form part of the said hereditaments so to be purchased as last aforesaid, then the sum of £———; And I hereby apportion the said sums of £——— or £——— as the case may be between the said hereditaments mentioned in the first and second schedules respectively to the said notice of claim in the proportions or sums of £———, or £——— as the case may be, in respect of the hereditaments mentioned in the first schedule to the notice of claim, and £———, or £——— as the case may be, in respect of the hereditaments mentioned in the second schedule to the notice of claim; the same apportioned sums to be paid by the said Corporation to the said owner for the purchase by them of the hereditaments so to be purchased by them as aforesaid, in addition to the other sums to be paid by the said Corporation as hereinbefore awarded. In witness, &c.

The First Schedule above referred to.

The Second Schedule above referred to.

The Third Schedule above referred to.

XLVI. *AWARD by Two* Referees *under the Agricultural Holdings Act*, 1883.

The Agricultural Holdings Act, 1883.

In the Matter of the Reference
Between A. B., of &c. . . . Tenant,
and
C. D., of &c. . . . Landlord.

TO ALL TO WHOM these presents shall come, We [*referee*], of &c., and [*referee*], of &c., the referees duly

XLVI. Award under Agricultural Holdings (England) Act, 1883.

appointed by the tenant and landlord respectively, pursuant to the provisions of the above Act, send greeting. WHEREAS the tenant has claimed compensation from the landlord under the said Act in respect of [*state the nature of the claim as stated in the Tenant's Notice of Claim, e.g.*] the value of unexhausted improvements by him on the above-mentioned farm (hereinafter referred to as the holding), and in respect of breaches of covenant alleged to have been committed by the landlord during the tenant's occupation of the holding, as appears by a notice of claim dated the ——— day of ———, 18—, and duly given to the landlord, pursuant to the provisions of the said Act: AND WHEREAS the landlord has disputed the said claim and has claimed compensation in respect of breaches of covenant alleged to have been committed by the tenant during his occupation of the holding, and other matters connected therewith, as appears by a notice of counterclaim, dated &c., and duly given to the tenant, pursuant to the provisions of the said Act: AND WHEREAS the landlord and tenant, being unable to agree on the amount and mode and time of payment of compensation to be paid under the said Act in respect of the said claim and counterclaim, or to concur in the appointment of a single referee to determine the same, have referred all the said matters and things in dispute between them to the award and determination of us, the referees duly appointed as aforesaid, who before entering on such reference duly appointed [*umpire*], of &c., to be our umpire by an instrument in writing, dated &c. NOW THEREFORE we, the said referees, having taken upon us the burthen of the said reference, &c., and having viewed the holding, hereby make and publish our award as follows, that is to say:—

Recitals: of tenant's claim;

of landlord's counterclaim;

of reference to arbitration.

Award.

Compensation awarded to tenant.

1. We find and determine that the tenant is entitled to compensation from the landlord for and in respect of the matters set forth in the first schedule hereunder written in the first column thereof, and we award that the amounts set forth in the second column of the same schedule are accordingly due from the landlord to the tenant, and that for the purpose of charging the estate of the landlord the improvements specified in the said schedule are to be deemed to be exhausted at the several times set opposite to them respectively in the third column of the same schedule.

Compensation awarded to landlord.

2. We find and determine that the landlord is entitled to

compensation from the tenant for and in respect of the matters set forth in the second schedule hereunder written in the first column thereof, and we award that the amounts set forth in the second column of the same schedule are accordingly due from the tenant to the landlord.

XLVI. Award under Agricultural Holdings (England) Act, 1883.

3. We therefore award and direct that the said landlord [*or* tenant, *as the case may be*] shall pay to the tenant [*or* landlord], the sum of £———, being the balance due in respect of the compensations so awarded as aforesaid, on or before the ——— day of ——— next.

Payment of balance found due.

4. We further award and direct that each of the parties to this reference shall bear his own costs of and incident thereto, except the costs of our award, and that the costs of this our award shall be paid by them equally.

Costs.

THE FIRST SCHEDULE ABOVE REFERRED TO.

Schedules (*z*).

THE SECOND SCHEDULE ABOVE REFERRED TO.

(*z*) These schedules may be in form somewhat similar to those given *ante*, pp. 215, 216. Or the decision of the arbitrators in respect of the several matters referred to them may be stated *seriatim* in the body of the award. No precedent of an award in that form is, however, here given, inasmuch as the terms employed in such cases are necessarily of a very special and technical nature, and vary according to the particular district and other circumstances.

ATTESTATION.

PRECEDENTS.

I. *ATTESTATION of an* INSTRUMENT NOT UNDER SEAL. (*Common Form.*)

SIGNED by the above-named A. B. in the presence of
C. D., of &c. [*add address and description*].

II. *ATTESTATION of a* DEED (*a*) *or* INSTRUMENT UNDER SEAL. (*Common Form.*)

SIGNED, sealed and delivered by the within-named [*or* above-named] A. B. in the presence of
C. D., of &c. [*add address and description*].

Attestation generally.

(*a*) It is usual for witnesses to attest the act of signing, sealing and delivery by the subscription of their names to a form of words to that effect written at the foot or on the back of the deed. Generally speaking, however, the formality of attestation is not essential to the validity of a deed unless it be made in exercise of a power which has prescribed that as a requisite circumstance: Burton, Comp. 445, 450. In such a case the terms of the power must be observed; but by the stat. 22 & 23 Vict. c. 35, s. 12, any deed or other instrument *inter vivos* executed in the presence of and attested by two or more credible witnesses is to be deemed a due execution of a power of appointment as regards execution and attestation. As to the attestation of wills, see 7 Will. 4 & 1 Vict. c. 26, s. 10, *infra*, tit. WILLS. See further, as to attestation of appointments by deed or will, Vol. I. p. 735, tit. APPOINTMENTS.

Attestation required by statutes.

Certain classes of instruments are required to be attested by statutory enactment, viz.:—

Warrants of attorney and cognovits, by the stat. 32 & 33 Vict. c. 62, s. 24.

Agreements between a master of a merchant ship and an

III. *ATTESTATION of Execution of a* DEED *by a* COMPANY *or* CORPORATION *having a* COMMON SEAL.

THE SEAL of the within-named company was affixed in the presence of

A. B., of &c.
C. D., of &c. } *Directors.*
E. F., of &c., *Secretary.*

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apprentice or seaman, by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), sects. 142, 150.

Grants of lands for charitable purposes are required by the Mortmain Act (9 Geo. 2, c. 36) to be made by deed, sealed and delivered in the presence of two or more credible witnesses. A deed attested by one witness, though executed and acknowledged for the purpose of inrolment in the presence of two persons who were parties to and executed the deed, but did not sign the attestation clause, was held not to satisfy the requirements of the Act: *Wickham* v. *Marquis of Bath*, L. R., 1 Eq. 17.

"The execution of every bill of sale by the grantor is to be attested by one or more credible witness or witnesses not being a party or parties thereto:" Stat. 41 & 42 Vict. c. 31, s. 10.

And by the Conveyancing Act, 1881, sect. 8 (1), "On a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence or that of his solicitor as such, but shall be entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor."

By the Common Law Procedure Act, 1854, it is provided that "it shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such instrument may be proved by admission or otherwise as if there had been no attesting witness thereto."

Where attestation is necessary to the validity of an instrument, the witness must be called or his absence must be accounted for, and his signature proved: *Bowman* v. *Hodgson*, L. R., 1 P. & D. 362.

IV. *ATTESTATION of the Execution of a Deed in which there are* INTERLINEATIONS (*b*), ERASURES *or* OBLITERATIONS.

SIGNED, SEALED, AND DELIVERED (*c*), by the within-named [A. B.] the words "[*words interlined*]" having been previously interlined [*or* written over obliterations], between [*or* obliterated in] the fourth and fifth lines of the first skin of the within-written indenture [*or* the word "*Henry*," having been previously interlined between the words "*Thomas Johnson*"] and the name ——— written [on an erasure in the tenth line of the second skin thereof] in the presence of, &c.

Effect of erasures, &c. after execution.

(*b*) A deed may be avoided by erasure or interlineation by a party interested, after the execution. In *Pigot's case*, 11 Co. 27 a, it was resolved, that when any deed is altered in a point material, by the plaintiff himself, or by any stranger, without the privity of the obligee, be it by interlineation, addition, erasing, or by drawing of a pen through a line, or through the midst of any material word, that the deed thereby becomes void. See also on this point *ante*, Vol. 1, p. 393. The modern doctrine, however, seems to be that an alteration by a mere stranger or spoliation in a material part of a deed will not invalidate it: *Henfree* v. *Bromley*, 6 East, 309. If the obligee himself alters the deed by any of the said ways, although it is in words not material, yet the deed is void. But if a stranger, without his privity, alters the deed by any of the said ways, in any part *not* material, it shall not avoid the deed: 2 Roll. Abr. 29. *Vide* Dyer, 261 b (28); *Master* v. *Miller*, 4 T. R. 320; Shep. Touch. 68.

An interlineation (if nothing appears to the contrary) will be presumed to have been made before the execution of the deed, and not after: *Trowell* v. *Castle*, 1 Keb. 22 (5); see also *Fitzgerald* v. *Lord Falconbridge*, Fitzgib. 214.

Rule contra as to bills of exchange.

Where however an alteration appears to have been made in a *bill of exchange*, it is incumbent in the person suing upon it to show that the alteration was not improperly made: *Henman* v. *Dickenson*, 2 Moo. & P. 289; 5 Bing. 183; *Bishop* v. *Chambre*, 3 Car. & P. 55; *Taylor* v. *Mosely*, 6 Car. & P. 273; *Knight* v. *Clements*, 3 Nev. & P. 375.

The modern practice is, when any alteration, interlineation, or erasure is made in a deed, before it is executed to take notice of it in the attestation: 4 Cru. Dig. 407, 4th edit. It is unnecessary, but not unusual, for the parties and attesting witnesses to initial alterations, &c., in deeds. As to wills, see stat. 1 Vict. c. 26, s. 21.

Insertion of Christian name after execution.

In the case of *Coke* v. *Brummell*, 2 Moo. 495, the question was whether a bond and warrant of attorney were invalidated on account of an alteration having been made in the name of one

IV. Of a Deed with Rasures, &c.

Coke v. *Brummell.*

of the obligees, Emilius Henry Delme (who afterwards assumed the name of Radcliffe), which had been written in the bodies of those instruments, when they were executed, "Emilius Delme" only, and the word "Henry" was afterwards added and interlined as part of his name.

Gibbs, C. J. said "This is an application to set aside a judgment, and the warrant of attorney on which it was entered up. This latter instrument was given as a collateral security to an annuity bond, in which the defendant Brummell was the principal, and Radcliffe, who now makes this application, his surety. At the time the bond and warrant of attorney were executed, the grantee was not aware that Radcliffe was called 'Henry' as well as 'Emilius,' and he did not discover it until he saw his signature at the foot of those instruments. He was then fearful that the warrant of attorney might prove defective, and therefore procured Radcliffe to re-execute it, having previously caused an alteration to be made throughout the body of it, by interlining and inserting the word 'Henry' between 'Emilius,' and 'Delme.' In point of fact, the warrant of attorney was perfect, without this alteration; but there can be no doubt but that judgment may now be entered upon it, Radcliffe himself not only having consented to such alteration, but re-executed the instrument;—besides, in an action on the bond brought against him in the Court of King's Bench, he pleaded a judgment recovered by the testator against himself and Brummell, thereby not only recognising the validity of the judgment, but, by making use of it, defeated that action; and after that he makes this application, whereby he seeks to set it aside. Under these circumstances, the Court are of opinion, that they cannot do this: first, because the nature of the securities was not defeated by the insertion of the word 'Henry,' to which alteration Radcliffe himself was a party; and secondly, because he afterwards recognised the judgment as being legally entered up, and availed himself of it in the action brought against him on the bond, in the Court of King's Bench."

New stamps not necessary on rectifying a mistake in name.

According to *Cole* v. *Parkin*, 12 East, 471, new stamps do not appear to be necessary on such an alteration as the above: *Vide ante*, Vol. 1, p. 394. It is, however, highly inadvisable to make any alteration whatever in a deed after it is executed. In the above case, although the alteration did not destroy the validity of the deed, yet the parties must have incurred considerable expense in consequence of that alteration. It might have so happened in the above case, that under the stamp laws then in force the number of words, with the addition of the interlineations, would make a greater number of words than were allowed according to the stamp used; in which case a new stamp on the deed would most certainly have been necessary.

Where the names of other obligors were added to a bail bond after it had been executed by some of the bail, with the concurrence of the agents of the obligors, and before it had been accepted by the sheriff, it was held that the bond was not rendered void by this alteration, *and that no additional stamp was necessary;* for, never having been out of the hands of the obligors, the bond was to be considered at the time of the addi-

IV. Of a Deed with Rasures, &c.

tion as in *fieri* only, and in the nature of an escrow: *Matson* v. *Booth*, 5 Mau. & S. 223.

And it has been decided that taking off the seal of some of the obligors in a *several* bond and substituting others does not vitiate it: *Collins* v. *Prosser*, 1 B. & C. 682. Though, according to several early cases, it is otherwise where the bond is *joint* and *several*: *Seaton* v. *Henson*, 2 Lev. 220: *Nicholls* v. *Haywood*, Dy. 59 a; and notes to the edition of 1794.

Addition of immaterial word after execution.

Where an addition is made to an instrument of a word, which the Court in construing it would have supplied, the alteration does not affect the validity of the instrument. Thus, where a bond was given conditioned for the payment of one hundred pounds by instalments, "until the full sum of *one pound*" should be paid; it was held, upon this principle, that the interlineation of the word *hundred* before the word *pound*, by a stranger, after the execution, did not avoid the bond, but that the insertion of the word in the declaration was a fatal variance: *Waugh* v. *Russell*, 1 Marsh. 311. The inclination of the Courts of the present day is certainly very strong against holding deeds to be void on account of alterations made subsequently to the execution, where no fraud was intended.

Blanks supplied with the consent of the executing party.

In the case of *Hudson* v. *Revett*, 5 Bing. 368, A. executed a deed of conveyance and trust for sale, for the benefit of his creditors: and the amount of the several debts of the creditors was stated in the deed, with the exception of one, for which a blank was left, and which blank it was agreed should be filled up when certain vouchers in the possession of A., by which its amount was to be ascertained, should be produced. The next day the blank was filled up accordingly, on the production of the vouchers. It was held that the deed was valid notwithstanding the filling up of the blank after execution.

Subsequent alteration of deed disregarded.

In the case of *Worrall* v. *Jacob*, 3 Mer. 256, a person, after executing a voluntary settlement which she retained in her possession, interlined a new limitation, and then re-executed it. The Court directed the deed to be carried into effect as it originally stood, and no attempt seems to have been made to impeach its validity on the ground of the alteration.

As to witness's testimony.

The execution of a deed is not impeached by the attesting witness saying that he does not know whether the blanks were filled up at the time or not: *England* v. *Roper*, 1 Stark. 304. And where it appeared that the description of the trade of one of the parties was struck out after execution, the deed was ruled to be admissible in evidence: *Doe* v. *Hirst*, 3 Stark. 60.

Result of the cases.

The result upon the whole seems to be, that at the present day no deed would be held to be void on account of any immaterial alteration, by whomsoever made after execution; and with respect even to a material alteration, if it be made with the consent of the parties affected, it forms no objection to the validity of the deed, and in *any* case the invalidity attaches only to the additional matter.

Instrument executed with material part blank.

But an instrument which is left blank in any material part, and is incapable of operation until such blank is filled up, is no deed, although executed by the parties; and cannot become effectual by the subsequent filling up of those blanks by a

V. *ATTESTATION of the Execution of a Deed by another Party, where Interlineations, &c. have been noticed in a previous Attestation.*

SIGNED, SEALED, AND DELIVERED, by the within-named C. D. (the interlineation and erasure noticed in the attestation of the execution by A. B. indorsed hereon, having been previously made), in the presence of, &c.

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stranger in the absence of the parties, unless he is authorized to do so by deed. Thus, in the case of *Hibblewhite* v. *M'Morine*, 6 M. & W. 200, it was held, that an instrument purporting to transfer shares in the Brighton Railway Company (which by act of Parliament was required to be by deed), and executed by the proprietor of the shares with the name of the purchaser in blank, and by him handed over to an agent, who, on finding a purchaser, filled up the blank with his name, was not a deed, nor effectual to transfer the shares.

Hibblewhite v. *M'Morine.*

(*c*) The usual mode of delivering a deed is to take it up and say,

Delivery of deeds.

"I deliver this as my act and deed."

But a deed may be delivered without words: *Staunton* v. *Chambers*, Hale MSS. Co. Litt. 36 a; Shep. Touch. 57; so a deed may be delivered by words, without any act of delivery; as, if the writing sealed lies upon the table, and the feoffor says to the feoffee, go and take up the said writing, it is sufficient for you; or it will serve your turn; or, take it as my deed, or the like words; it is a sufficient delivery; Co. Litt. 36 a, 49 b: *Thoroughgood's case*, 9 Co. 136 a.; Shep. Touch. 58; 4 Cru. Dig. 33, 2nd edit.

Where a deed is attested to have been "signed, sealed, *and delivered*," it is not necessary in proving its execution that the witness should be able distinctly to recollect the act of delivery: the presumption will be in favour of the execution having been according to the attestation: *Ball* v. *Taylor*, 1 Car. & P. 417.

VI. *ATTESTATION of the Execution of a Deed by a* BLIND PERSON (*d*).

THE within-written indenture was signed, sealed, and delivered by the within-named A. B.; and he being blind, the same indenture was first carefully read (*e*) over to him in the presence of us [*witnesses*].

VII. *ATTESTATION of the Execution of a Deed by a Person* DEAF AND DUMB (*f*).

THE within-written indenture was signed, sealed, and delivered, by the within-named A. B., who, being deaf and dumb, but capable of reading, the same indenture was first read over by him, and he seemed perfectly to understand (*or if the witnesses can so attest*, perfectly understood) the same, in the presence of us [*witnesses*].

A blind person may make a valid deed or will, &c. The will of a blind person need not be read in the presence of the witnesses.

(*d*) A person whose only infirmity is blindness, may make a valid deed or will, and could formerly have acknowledged a fine or recovery: *Shulter's case*, 12 Co. 90; Com. Dig. *Capacity*, (C).

(*e*) Vide *post*, n. (*f*). It is not necessary to the validity of the execution of a will of lands by a blind man, that it should be read over to him in the presence of the attesting witnesses: *Longchamp* d. *Goodfellow* v. *Fish*, 2 Bos. & P., N. R. 415.

If a person liable, from blindness, ignorance, or other causes, to be deceived, is induced to execute a deed on the supposition that its effect is different from that which it really is, the deed will be fraudulent and void against him: See *Doe* d. *Lloyd* v. *Bennett*, 8 Car. & P. 124.

A person born deaf and dumb is not thereby incapacitated from making a deed or will, &c.

(*f*) A person born deaf and dumb is not thereby incapacitated to execute a deed or will, if he has sufficient understanding to give evidence of his assent, either by his own signs or by signs with the assistance of an interpreter. See *Ruston's case*, 1 Leach, Cr. C. 408, and *Steel's case*, 1 Leach, Cr. C. 451. The learned Dr. Cowell says, one who is deaf and wholly deprived of his hearing, cannot *give;* the same is also to be understood of one who is dumb and cannot speak. Yet (according to the opinion of some) they may consent by signs and nods; but, he adds, it is generally held that he who is dumb cannot make a gift, because he cannot consent to it. Cowell's

Inst. 107, ed. 1651. So Wakering, in his readings at Lincoln's Inn, June, 1626, says, a man deaf and dumb from his birth is *non compos;* but not, if by accident. Dyer, 56 a. (13). But these opinions cannot be supported; for Perkins, whose authority on conveyancing subjects is very considerable, says, if a man be born dumb, but can hear well, such a man at full age may make a gift by delivery of his hands, or by signs; and without delivery of his hands, by signs only. And a man who is born deaf and dumb may make a gift if he have understanding: but it is rare for such a person to have understanding; for a man to have perfect understanding, ought to hear: yet many persons have understanding by their sight, &c. And a man born dumb and blind may have understanding: Perk. 5 b, H. English edit. s. 25. See also Finch's Law, 103, Pickering's edit. And Lord Coke says, a man born deaf, dumb, or blind, so that he hath understanding and sound memory, albeit he expresses his intention by signs, may enfeoff, &c. Co. Litt. 42 b; Com. Dig. *Capacity* (C). In *Martha Elyot's case,* Carter, 53, Lord Chief Justice *Bridgeman* (the celebrated conveyancer), on a consultation with Archer, Tirrell and Brown, the other judges, said, "A woman born deaf and dumb comes before me to levy a fine. She and her three sisters have a house and land. An uncle hath maintained her, and taken great care of her, and he is to buy the house and land of them; and he agrees to maintain her if she will pass her land for security. As of her intelligence, the sisters say, she knows and understands the meaning of all this. I demanded what sign she would make for passing away her lands, and as it was interpreted to me, she put her hands that way where the lands lay, and spreads out her hands. It being a business of this nature, and for her own good, I thought fit to communicate it to you." Justice Archer said, "The rule in law is, that in fines and feoffments, &c., if there is a good intelligence, they may do such acts; they may be admitted to make contracts for their good; they are admitted upon examination to marry, and upon examination to receive the sacrament. They may make contracts for their persons—why not for their lands? I conceive it may be done; and your Lordship may take the fine." To this Tirrell and Brown agreed, and the fine was taken.

Caution should be adopted, where the party is deaf and dumb.

But in all cases of this kind too much care and circumspection cannot be exercised; and therefore it might not be prudent for Commissioners, under the stat. 3 & 4 Will. 4, c. 74 (as amended by the stat. 45 & 46 Vict. c. 39), to take the acknowledgment of a deaf and dumb person without noticing the fact in the certificate. In a case that might admit of some doubt as to the capacity, it would be prudent for the acknowledgment to be taken by a judge.

A blind, deaf, and dumb person cannot make a deed or will, &c.

But persons who are born blind, deaf, and dumb, as they have always wanted the common inlets of understanding, are incapable of making either a gift, lease, grant, or will: Co. Litt. 42 b; Perk. s. 25; Dyer, 56 a (13); Com. Dig. *Capacity* (D. 4); 2 Bla. Com. 497.

VIII. *ATTESTATION of the Execution of a Deed by an* ILLITERATE PERSON.

THE within-written indenture was sealed and delivered, by the within-named A. B., who made his mark thereto, the same being previously read (*g*) over to him in the presence of us [*witnesses*].

Attestation of deed executed by an illiterate party.

(*g*) It is not common in practice to vary the usual form of attestation on account of the person executing it being illiterate. But it deserves consideration whether, in that case, it might not be generally prudent to state in the attestation the fact of having read the deed to the executing party. For a necessary circumstance to a deed is, that it be read if any of the parties require it; if not, the deed will be void as to the party requiring it to be read. If a person can, he should read it himself; and if he be blind or illiterate, some other should read it for him. But if the illiterate party do not desire the deed to be read to him, his execution without hearing it read will be valid: *R.* v. *The Inhabitants of Longnor*, 1 Nev. & M. 576; 4 B. & Ad. 647. If it be read falsely, it will be void, at least for so much as was misread; unless it be agreed, by collusion, that the deed be read falsely, on purpose to make it void; for in such a case it will bind the fraudulent party: *Manser's case*, 2 Co. 3; Moore, 182; 4 Leon. 62; *Thoroughgood's case*, 2 Co. 9 b; *Shulter's case*, 12 Co. 90; *Anon.*, Skin. 150;

Attestation or execution of will or deed by mark.

Bennett v. *Vade*, 2 Atk. 327; 4 Cru. Dig. 31, 2nd ed. In *Harrison* v. *Harrison*, 8 Ves. 185, and in *Addy* v. *Grix*, 8 Ves. 504, it was determined, that an attestation of a devise, where one of the witnesses signed by a mark, was good within the Statute of Frauds, which required the witnesses to wills of freehold lands to attest and *subscribe* the will. The statute required the testator to *sign*, and therefore the principle of these determinations is applicable *à fortiori* to the signature of the testator himself, since the word "subscribe" seems much more forcibly to point to the actual handwriting than "sign," which, without any strain upon its literal sense, might be deemed to be satisfied by *any symbol* of the testator's consent and ratification: Roberts on Frauds, 387. The same observation is equally applicable to conveyances under the Statute of Frauds, which are required to be *signed* by the parties making the same. *Vide ante*, Vol. 1, p. 272, *seq.* Indeed, if such a construction should not prevail, the statute would have the extraordinary effect of incapacitating persons, who through illness or illiteracy could not write, from devising their lands, or conveying them by deed. Evidence to prove that the testator could write cannot be gone into: *Baker* v. *Dening*, 8 Ad. & E. 94; *Taylor* v. *Dening*, 3 Nev. & P. 228, *S. C.*

Illiterate witnesses.

But it is not prudent to have witnesses who cannot write, on account of the difficulty of making proof of the attestation after their death.

It is not even necessary that a person incapacitated by in-

IX. *ATTESTATION of a Deed executed under a* POWER OF ATTORNEY.

SIGNED (*h*), SEALED, AND DELIVERED (*i*), by the within-named [*attorney*], as the attorney of the within-named [*principal*], in the presence of us [*witnesses*].

X. *ATTESTATION of a Deed executed by one of the Parties in his own Right, and as the Attorney of another of them.*

THIS WRITING was signed, sealed and delivered by the above-named A. B. with his own name, and as his own act and deed; and afterwards, as the attorney, and with the name, and as the act and deed, of the above-named C. D., by virtue of a letter of attorney given to him the said A. B. for that purpose, and dated &c., in the presence of us [*witnesses*].

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firmity or want of instruction, should make a mark by way of signature to a deed; as, if it is signed for him by a stranger, at his request and in his presence, it is sufficient: *R.* v. *Inhabitants of Longnor*, 1 Nev. & M. 576; 4 B. & Ad. 647. An execution in this manner is different from an execution by an attorney, who can only bind his principal by deed, in virtue of an authority under seal. It is to be observed, too, that signature is no part of a deed at common law; and that, at the present day, the delivery of the deed by the party himself is a sufficient recognition of the sealing to give effect to the instrument as his deed. An attorney, to bind by deed, may clearly be appointed by deed sealed merely, and, not signed, by the principal, unless by some enactment the act which he is to perform can only be done by an attorney appointed by writing under the hand of the principal. *Vide ante*, Vol. 1, pp. 86, 735; and *infra*, tit. POWER OF ATTORNEY.

(*h*) As to the testimonium and signature, see the next form.

(*i*) The usual mode of delivering a deed by an attorney is, to take it up, and say,

The mode of delivering a deed by an attorney.

"I deliver this as the act and deed of the within-named [*principal*]." *Vide ante*, p. 257, n. (*o*).

XI. *ATTESTATION of an Instrument intended to operate as an* Escrow (*k*).

SIGNED, SEALED, AND DELIVERED by the within-named [*party*] as an Escrow, and placed in the hands of A. B. to be delivered up to the within-named [*other party*] as the deed of the said [*party*], when the sum of £———, the within mentioned consideration-money, shall have been paid by the within-named [*other party*] to the said A. B. as the agent and on the behalf of the said [*party*].

(*k*) It is sometimes convenient to execute an instrument as an escrow, or in other words to postpone its operation until some future event or contingency. The proper form of such an execution, according to Sheppard's Touchstone, 58, is as follows:—

Form of delivering an escrow.

"I deliver this to you as an escrow to deliver to the party as my deed, upon condition that he do deliver to you £——— for me, or upon condition that he deliver up the old bond he hath of mine for the same money (or as the case is);" *or*, "I deliver this to you as an escrow to keep until such a day, upon condition that if, before that day, he to whom the escrow is made shall pay to me £———, [*or*, give me a horse, *or*, enfeoff me of the manor of Dale, *or perform any other condition*,] then you shall deliver the escrow to him as my deed."

When an instrument operates as an escrow.

But an adherence to this precise form is not essential in order to the delivery as an escrow; for, in opposition to some of the early authorities (Shep. Touch. 56; Com. Dig. tit. Fait. A. 3), it is now clear, that even if the instrument be executed as the deed of the party, in the usual manner, yet if it be accompanied by an agreement suspending its operation until some future time or event, or if such intention can be inferred from the circumstances of the case, this will constitute it an escrow: see *Furness* v. *Meek*, 27 L. J. (N. S.) Ex. 34; *Watkins* v. *Nash*, L. R. 20 Eq. 262.

Thus where previously to the execution of a creditor's composition deed, it was agreed, in the presence of the person who covenanted as surety for the payment of the money to be accepted by the creditors, that it should be void unless all the creditors executed it, and the surety then executed the deed in the ordinary way, without using any qualifying expressions at the time of execution, and the deed was then delivered to one of the creditors, in order that he might get it executed by the rest of the creditors; it was held, that this was to be considered a delivery of the instrument as an escrow, and that all the creditors not having executed it, the surety was not bound: *Johnson* v. *Baker*, 4 B. & Al. 440. So, in a subsequent case, when it appeared from the evidence of

one of the subscribing witnesses to a bond, that it was agreed at the time of the execution that it should remain in the witness's hands until the death of a third person, and until certain promissory notes in the hands of the obligee should be delivered up, and upon this evidence it was contended that the plaintiff ought to be nonsuited; a verdict was entered for him, with liberty to move to enter a nonsuit. The Court granted a new trial, upon the ground that it should have been presented as a question of fact for the jury upon the whole evidence, whether the bond was delivered as a deed to take effect from the moment of such delivery, or whether it was delivered to the witness upon the express condition that it was not to operate as a deed until the events before mentioned: *Murray* v. *Earl of Stair*, 2 B. & Cr. 82. See also *Matson* v. *Booth*, 5 M. & S. 223: *Hudson* v. *Revett*, 5 Bing. 368; *Latch* v. *Wedlake*, 3 Per. & D. 499. Where a deed was executed, and the grantor laying his hand upon the seal, said, "This is my last act and deed," and then gave the deed (which was a gift of all his real property to his daughter) to a third person, with directions not to give it to the grantee until the grantor's death, it was held by *Coleridge*, J., that the delivery was complete: *Doe* d. *Lloyd* v. *Bennett*, 8 Car. & P. 124. See *Peryman's case*, 5 Co. 84, b: *Froset* v. *Walshe*, Bridgm. 1: and *Graham* v. *Graham*, 1 Ves. J. 272, where it is laid down as unquestionable that a bond, &c., may be delivered as an escrow to be delivered to the obligee upon performance of a condition, and that upon performance of the condition it will take effect from the original sealing and delivery, and that although the obligor and obligee are both dead. And it is the same of an escrow delivered by a *feme sole*, the condition happening after marriage: *Brag's case* and *Butler's case*, Year B. 27 Hen. VI., 7. It was formerly considered that for a deed to remain an escrow it must be delivered to one that is a stranger to it, and not to a party himself to whom it is made: Shep. Touch. 58. But this rule has been frequently departed from in recent times. So where an instrument, after being executed by one party, was sent to the agent of another party, it was held that this was a delivery for the benefit of all parties and not inconsistent with the instruments preserving the character of an escrow: *Millership* v. *Brookes*, 5 H. & N. 797. And in a recent case, *Hall*, V.-C., after referring to the doctrine laid down in Sheppard's Touchstone, said: "When these authorities are examined, it will be found that it is not merely a technical question as to whether or not the deed is delivered into the hands of A. B. to be held conditionally; but when a delivery to a stranger is spoken of, what is meant is a delivery of a character negativing its being a delivery to the grantee or to the party who is to have the benefit of the instrument. You cannot deliver the deed to the grantee himself, it is said, because that would be inconsistent with its preserving the character of an escrow. But if upon the whole of the transaction it be clear that the delivery was not intended to be a delivery to the grantee at that time, but that it was to be something different, then you must not give effect to the delivery as being a complete delivery, that not being the intent of the

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persons who executed the instrument." And in a later part of his judgment his Honour added: "But I might go further and say if it were necessary to determine the question, that the document might be an escrow, even though there was no particular person selected who, under the circumstances, could be considered as being the person into whose hands it was delivered, it being clear that there was no delivery at all to the grantee, that the delivery was not intended to be a delivery to the grantee at all, and that it was intended to be an instrument incomplete as a transfer of the legal estate, until the conditions prescribed had been performed:" *Watkins* v. *Nash*, L. R., 20 Eq. at pp. 266, 267.

There is an important distinction to be observed between cases of delivery of an escrow and of retainer of a deed in his own possession by the grantor. In the former class of cases the technical delivery is not complete until the happening of some specified event; in the latter, the technical delivery is completed, and the deed (unless a case of mistake be established) can be cancelled only by the exercise of an express power of revocation.

Not necessary that a grantor should part with the deed.

It is not essential to the operation of a deed that it should be delivered up by the party executing it, to the person for whose benefit it is intended, or to any person on his behalf; for, in many instances, deeds have been held to be binding on the grantor or obligor, though never out of his custody or control. Thus, in *Barlow* v. *Heneage*, Pr. Ch. 211, G. H. executed a deed conveying an estate to trustees, upon trust to receive the profits, and put them out for the benefit of his two daughters, and executed a bond to the same trustees conditioned to pay them 1,000*l.* at a certain day, in trust for his daughters; but he kept both deed and bond in his own power, and received the profits of the estate till his death; he noticed the bond by his will, and gave legacies to his daughters in full satisfaction of it, but the daughters elected to have the benefit of the deed and bond, and filed a bill in equity accordingly, praying an account, and to have the profits of the settled estate from the date of the settlement, and the 1,000*l.*, with interest, from the time it became payable.

Deed kept in grantor's possession.

It was objected that the deed and bond being voluntary, and always kept by the father in his own hands, were to be taken as a cautionary provision only in case of death, and that they ought not to have profits or interest farther than from the death of the father. Lord Keeper *Wright* said, that these were the father's deeds, and he could not derogate from them; but the parties agreed to set the maintenance of the daughters against the profits received by the father from the estate; they insisted, however, to have interest on the bond from the time when the money was payable, and it was decreed accordingly.

In *Lady Hudson's case*, cited by Lord Keeper *Wright*, Pr. Ch. 235, a father being displeased with his son, made a settlement on his wife of 100*l.* per annum, in augmentation of her jointure; and afterwards, being reconciled to his son, cancelled the deed, and so it was found at his death; and, on a trial at law, the deed being proved to have been executed, was adjudged good, though cancelled, and the son having filed a bill in equity to be relieved against the deed, Lord *Somers* dismissed the bill.

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So in *Clavering* v. *Clavering*, 2 T. R. 473, Pr. Ch. 235, where A., in 1684, settled an estate upon his eldest son; and in 1690 made a settlement of the same estate upon his second son; he never delivered up or published the settlement of 1684, but had it in his own power, and it was found after his death among his waste papers. A bill was filed by the second son to have the benefit of the settlement of 1690, and to be relieved against the settlement of 1684; but Lord Keeper *Wright* dismissed the bill, observing, that, though the settlement of 1684 was always in the custody or power of A., yet that did not give him a power to resume the estate.

In *Naldred* v. *Gilham*, 1 P. Wms. 577, Mrs. Naldred, in 1707, executed a deed, by which she covenanted to stand seised to the use of herself, remainder to her nephew A. (a child three years old), in fee. She kept this deed in her possession; but afterwards burnt it and made a new settlement of the premises, by which she limited them to herself for life, with remainder to B., another nephew, in fee, and delivered the deed to him. Previously to making the second settlement she consulted with a lawyer about it, who told her she had put it out of her power, whereupon she expressed great concern, saying she had been imposed upon. A.'s father having surreptitiously obtained a copy of the former settlement before it was burnt, now filed a bill as the next friend of his infant son, to establish this copy, and to have the second settlement delivered up; and Sir Joseph Jekyll determined for the plaintiff, and granted a perpetual injunction against the defendant, who claimed under the second settlement. Upon an appeal to Lord Chancellor *Parker*, his lordship reversed this decree, because it was plain that the aunt intended to keep the estate in her own power; that she designed that there should have been a power of revocation in the settlement; that she thought while she had the deed in her custody, she had also the estate at her command; that, in fact, she had been imposed upon by the deed being made an absolute conveyance; that the plaintiff, with a title, which, if any, was a legal one, ought not to be assisted in equity. Lord *Parker's* decision, therefore, is consistent with the position that a deed in general may be valid, though it remains under the control of the party who executes it. See *Cecil* v. *Butcher*, 2 Jac. & W. 565.

So in *Sear* v. *Ashwell*, 3 Swanst. 411, n., where A., being a widower, and contemplating a second marriage, made a settlement to trustees for 100 years in nature of a mortgage, with a condition that if his heirs or executors paid 300*l.* to R., his eldest son, and 200*l.* a piece to I., his younger son, and M., his daughter, then the term to cease. A. married: he afterwards burnt the settlement and made a will. The question was, whether the younger children were entitled to the benefit of the settlement, and Lord *Eldon*, C., held that they were entitled; for that the settlement was good against the testator, and all claiming under him; and A. had no power to revoke it. It had been contended *that being always kept in A.'s own custody*, and never delivered to the trustees, and he having destroyed it, it should not now be set up again; and for this purpose the case of *Naldred* v. *Gilham*, 1 P. Wms. 577, was cited; but his lordship

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thought that that was different; there the settlement was voluntary in every respect, being for the benefit of a person for whom the settlor was not bound to provide; here for children unprovided for. It may, however, be questioned whether the true distinction is not that in *Naldred* v. *Gilham*, the deed was not drawn in accordance with the intention of the settlor, so that the settlor would have been entitled to have it reformed on the ground of mistake, while in *Sear* v. *Ashwell* there was no room for any such contention.

So in *Boughton* v. *Boughton*, 1 Atk. 625, where a voluntary settlement had been made without power of revocation, and the settlor kept it by him, Lord *Hardwicke* considered it as valid and operative against a subsequent will: and his lordship distinguished the case from *Naldred* v. *Gilham*, which he said was not applicable to every case, but depended upon particular circumstances; and his lordship, on another occasion, referred to the case in nearly the same terms: *Bolton* v. *Bolton*, 3 Swanst., 415, n.

In *The Attorney-General* v. *Jones*, 3 Pri. 368, indeed, the intention of an instrument of settlement by the donor was made one of the grounds for holding it to be testamentary, so as to subject a sum of money directed to be raised under the trusts of it to the legacy duty; but the case may be considered as *sui generis*, and the arguments of *Wood*, B., who dissented from the judgment, have generally been considered as having more weight than those by which the judgment was supported. (See some observations upon this case, 1 Jarm. Wills, 20, 23, and see *Tompson* v. *Browne*, 3 My. & K. 32.)

Deed operates from the delivery.

The doctrine that a deed will operate though it is not parted with by the person who executed it, was recognised in *Worall* v. *Jacob*, 3 Mer. 256, *ante*, p. 256, and *Doe* d. *Garnons* v. *Knight*, 5 B. & C. 671. In the latter case, however, the mortgage, the validity of which was in dispute, had been delivered by the debtor to his sister, who lived in an adjoining house, expressly for the use of the creditor, though the latter was ignorant of the circumstance, and the sister was not aware of the contents of the parcel which inclosed the deed.

A deed, generally speaking, takes effect from the delivery, and not from the date, and the fact of the date being impossible, as the 30th of February, does not affect its validity: but when a reference is made to the date for the purpose of computing time; as where a person covenants to pay a sum of money within a certain period from the date, or a term is granted from the date; the computation will be made from the day the instrument bears date (assuming the date to be a possible one), and not from the day of its actual execution: *Styles* v. *Wardle*, 4 B. & C. 908.

Note.—As to attestation of appointments by deed or will in exercise of powers, see *ante*, Vol. I., p. 735, *seq.* As to attestation of wills, see *ante*, Vol. I., p. 740, *seq.*, and also see tit. Wills.

BOND.

PRELIMINARY DISSERTATION.

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1. Of Bonds generally.

Bonds were formerly a very favourite form of security, but are to a great extent superseded in modern practice by covenants. Various causes have contributed to this result. In the first place, the form of a bond is rigid and inconvenient, and especially ill-adapted to cases where the obligation is to be limited by qualifying provisions; and of course bonds are quite inapplicable to cases where there is mutuality of obligation. Moreover, a bond creates merely a personal obligation enforceable by action, and if any further security is required, it must be supplemented by another instrument. Definition of a bond.

Bonds, however, are still of not unfrequent occurrence as securities for the performance of agreements, for payment of annuities, or for the payment of money by instalments; also for performance of contracts of work and labour, for resignation of benefices, for indemnity, for faithful service, &c. They are, moreover, required to be given on certain occasions by the provisions of various Acts of Parliament, and are required by many public corporations pursuant to ancient usage.

Of Bonds generally.

A bond is an acknowledgment of a debt by writing under seal, Vin. Abr. *Oblig.* (L), specifying the debt, and therefore, it is said, called a specialty: Bac. Ab. *Oblig.* (A). A specialty being under seal, is of a higher nature than a simple contract (*a*). Accordingly the acceptance of a bond from the debtor himself (but not from a stranger), extinguishes the inferior debt for which it is accepted: 1 Roll. Ab. 604; *Pudsey's case*, cit. in *Hooper's case*, 2 Leon. 110; *White* v. *Cuyler*, 6 T. R. 176.

Merger of simple contract debt in specialty.

What constitutes a bond.

No technical form of words is necessary to constitute a bond. Any sealed writing, Comb. Ab. *Fait*, (A) 1, which amounts to an acknowledgment of a debt, present or future, is a bond. Thus, a memorandum, "That I, A. B., do owe C. D. 20*l.* to be paid at Easter next;" or, that "I agree to pay 10*l.* to C. D." is a good bond: Touch. 368; Com. Dig. *Oblig.* (B); Bac. Ab. *Oblig.* (B); Vin. Ab. *Oblig.* (D), (L); *Ascue* v. *Hollingworth*, Cro. Eliz. 544; 1 Vent. 238; Holt, 208; *Sawyer* v. *Mawgridge*, 11 Mod. 218. But the recital

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All specialty and simple contract debts of deceased persons to stand in equal degree after 1st Jan. 1870.

(*a*) The distinction between a specialty and a simple contract debt is of less importance than formerly; for, by the stat. 32 & 33 Vict. c. 46, it is enacted that "In the administration of the estate of every person who shall die on or after the 1st day of January, 1870, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed, or other instrument under seal, or is otherwise made or constituted a specialty debt; but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable, any statute or other law to the contrary notwithstanding: provided always, that this Act shall not prejudice or affect any lien, charge, or other security which any creditor may hold or be entitled to for the payment of his debt."

A specialty creditor, however, still retains in some cases the advantage of being entitled to bring an action for his debt at any time within twenty years after the cause of such action accrued, or, if under any disability, then within twenty years after the removal thereof. See stat. 3 & 4 Will. 4, c. 42, s. 3. But the limitation of *twelve* years imposed by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), sect. 8, set out *ante*, tit. Abstracts, Vol. I., p. 28, applies to the personal covenant in a mortgage deed as well as to the remedy against the land: *Sutton* v. *Sutton*, 22 Ch. D. 511; and this rule applies equally to a collateral bond given to secure a mortgage debt: *Fearnside* v. *Flint*, *ibid.* 579.

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of a debt under hand and seal has been held to be no specialty debt, though contained in a deed; for it must stand on its own force: Per Lord *Hardwicke*, *Lacam* v. *Mertins*, 1 Ves. sen. 313. See *Bottrell* v. *Summers*, 2 Y. & J. 407. It follows, that a covenant to pay a sum certain on a day fixed (and *id certum est quod certum reddi potest*, 2 Ld. Raym. 814) is a bond: *Browne* v. *Pendlebury*, Cro. Eliz. 268; *Ingledew* v. *Cripps*, 2 Ld. Raym. 814; Vin. Ab. *Debt*, (D). But conversely, it is not always true that a bond is a covenant; for though a deed poll, which is considered to be made with all the world, may contain a covenant with any person, 2 Roll. Ab. 22, (F) pl. 1; *Hill* v. *Carr*, 1 Ch. Cas. 294; *Hollis* v. *Carr*, 2 Mod. 91 (where it was said by Lord *Nottingham*, C., that covenant would lie on a bond, for it proves an agreement (*b*)); *Holles* v. *Carr*, 3 Swanst. 638; *Andrews* v. *Ellison*, 6 Moore, 199; *Anon.*, 3 Leon. 119, pl. 169; *Gardner* v. *Lachlan*, 8 Sim. 123; and see *Norrice's case*, Hardr. 178; Com. Dig. *Action* (M) 4; Doug. 521; yet an acknowledgment made in an indenture by a party thereto of a debt due to a stranger to the indenture, though a good bond, is no covenant: *Storer* v. *Gordon*, 3 Mau. & S. 322; *Metcalfe* v. *Rycroft*, 6 Mau. & S. 75; *Berkeley* v. *Hardy*, 5 B. & Cr. 355; *Lord Southampton* v. *Brown*, 6 B. & C. 718.

A covenant is a bond, when: action on covenant.

What is a covenant.

Stat. 4 Geo. 2, c. 26.

It has been said, that since the statute 4 Geo. 2, c. 26, all bonds must be in the English language; but this statute seems only to apply to bonds given in proceedings in the Courts of this kingdom; and certainly does not extend to bonds executed abroad. Apparently where, by the custom of the place in which the instrument is executed, any different mode of execution is adopted in place of sealing, the deed will be good: *Adam* v. *Kerr*, 1 Bos. & P. 360. See further Dicey, Law of Domicil, 151: Westlake, Priv. Int. Law, ss. 171, 173.

Bonds executed abroad.

Signature not required.

A bond is good without signature, if sealed and delivered; for the Statute of Frauds has been held not to apply to bonds or deeds, per *Willes*, J. in

(*b*) Where parties by deed agreed "by way of declaration and not of covenant," the qualification was rejected as absurd: *Ellison* v. *Bignold*, 2 Jac. & W. 503, 510.

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Holmes v. *Mitchell*, 7 C. B. (N. S.) at p. 368; and see *Cherry* v. *Heming*, 4 Ex. 631. See also Prest. Shep. Touch. p. 56, n. 24; Cr. Dig. tit. 32, c. 8, sect. 2.

Mr. Preston's remark, that the statute does not extend to deeds, Prest. Shep. Touch. p. 56, n. 24, is too general.

Bill or single bond.

Lord *Coke* says, a *bill* is a single bond, without condition: Co. Litt. 172, a. Lord Chief Baron *Comyns* says, a single bill is, when a man is bound to another by bill or note without a penalty: Com. Dig. *Obligation* (C). A bond or covenant to pay an annuity, without any penalty or condition, is a single bond, upon which action may be brought whenever any part of the annuity falls due: *Morrant* v. *Gough*, 7 B. & Cr. 206; 1 Man. & Ry. 41.

Obligation.

Obligation is a word in its own nature of a large extent; but it is commonly taken in the common law for a bond containing a penalty, with a condition for payment of money, or to do or suffer some act or thing, &c.: Co. Litt. 172, a.

Bonds by infants for necessaries.

By a single bond, an infant not residing under the parental roof may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterwards: March. 145; 1 Roll. Abr. 729, pl. 7; *Russell* v. *Lee*, 1 Lev. 86. But, if an infant bind himself in an obligation or other writing, with a penalty, for the payment of any of those things, that obligation shall not bind him: Co. Litt. 172, a, and Hargr. n. (2); 1 Roll. Abr. 729, pl. 8; Noy's Max. 39.

Confirmation.

Bonds by Infants.]—A bond by an infant which is void *ab initio*, cannot, of course, be confirmed after majority; but a confirmation under seal was under certain circumstances formerly held to operate by estoppel, or by creating a new contract: *Baylis* v. *Dineley*, 3 Man. & S. 477.

The question of the confirmation or ratification of contracts by infants was formerly of great importance, inasmuch as many kinds of contracts entered into by infants were at common law regarded not as void, but as merely voidable, and therefore

capable of being adopted and rendered valid by the infant when he attained his majority. Of Bonds generally.

But by the Infants Relief Act, 1874 (37 & 38 Vict. c. 62), all contracts by infants except with regard to necessaries, and all accounts stated with infants, are rendered absolutely void. The provisions of this Act are as follows:—

Sect. 1. "All contracts, whether by specialty or by simple contract, henceforth (*c*) entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void; provided always, that this enactment shall not invalidate any contract into which an infant may by any existing or future statute (*d*), or by the existing rules of common law or equity, enter, except such as now by law are voidable." Contracts by infants, except for necessaries, to be void. Royal assent, 7th Aug. 1874.

Sect. 2. "No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age." No action to be brought on ratification of infant's contract.

Sect. 3. "This act may be cited as 'The Infants Relief Act, 1874.'" Short title.

(*c*) The section renders inoperative a ratification after the passing of the Act of a contract entered into before that date: *Ex parte Kibble*, L. R., 10 Ch. 373. This section virtually repeals sect. 5 of Lord Tenterden's Act (9 Geo. 4, c. 14), which provided that an infant should not be charged except upon a written ratification, the construction of which was a question for the Court, not for the jury. See *Rowe* v. *Hopwood*, L. R., 4 Q. B. 1.

"The words of this section are perfectly general, and they apply to all contracts of an infant except those which are expressly excepted, and they cannot be restricted so as not to apply to trade debts:" per *Jessel*, M. R., in *Ex parte Jones* (C. A.), 18 Ch. D. at p. 122. The Court of Appeal in this case expressly declared the decision to the contrary of *Bacon*, C. J., in *Ex parte Lynch*, 2 Ch. D. 227, to be overruled. The section has been held to apply to promises to marry: *Coxhead* v. *Mullis*, 3 C. P. D. 439. See also *Northcote* v. *Doughty*, 4 C. P. D. 385.

(*d*) *E. g.*, as member of a building society, see stat. 37 & 38 Vict. c. 42, s. 38, or of a friendly society, 38 & 39 Vict. c. 60, s. 15, or of an industrial society, 39 & 40 Vict. c. 45, s. 11, or by bond under the Customs Act, 39 & 40 Vict. c. 36, sects. 165 *et seq.*

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Necessaries for which an infant may contract.

With respect to the necessaries for which an infant may contract a debt, the question always bears a reference to the condition of the parties. Necessaries do not consist simply in any absolute thing; as in food, clothes, or lodging; but in any article which may correspond with the condition and circumstances of the infant. Even clothes are not necessaries, if the infant is supplied with them by his parents or friends: *Cook* v. *Deaton*, 3 Car. & P. 114; *Story* v. *Pery*, 4 Car. & P. 526; *Burghart* v. *Hall*, 4 M. & W. 727. Necessaries for an infant's wife are necessaries for him; but not if provided in order for the marriage: *Turner* v. *Trisby*, Str. 168. Expensive uniforms for infant officers in the army; *Burghart* v. *Hall*, 4 M. & W. 730; and liveries for their servants, *Hands* v. *Slaney*, 8 T. R. 578; and regimentals of infant members of volunteer corps, have been held to be necessaries: *Coates* v. *Wilson*, 5 Esp. 152. So, it seems, money advanced at the request of an infant to a parish officer, to free the infant from supporting his bastard child, is a necessary for which an infant may give a single bill: *Fisher* v. *Mowbray*, 8 East, 330.

The costs of a solicitor employed to draw up the marriage settlement of a female infant are recoverable: *Helps* v. *Clayton*, 34 L. J. (N. S.) C. P. 1. Also the expenses of the funeral of a deceased husband or wife incurred by the order of an infant widow or widower: *Chapple* v. *Cooper*, 13 M. & W. 259.

The question of necessaries is to be governed by the real circumstances of the infant, and not by his ostensible situation: *Ford* v. *Fothergill*, Peake, 301; but see *Dalton* v. *Gib*, 7 Scott, 117; *Brayshaw* v. *Eaton*, 7 Scott, 183. But the jury shall judge what things are necessary: *Makarell* v. *Bachelor*, Cro. Eliz. 583. See *Burghart* v. *Angerstein*, 6 Car. & P. 690; *Lowe* v. *Griffith*, 1 Scott, 458; *Peters* v. *Fleming*, 6 M. & W. 42; *Ryder* v. *Wombwell*, L. R., 4 Ex. 32. Where the verdict of the jury appeared to be perverse, a new trial may be granted: *Harrison* v. *Fane*, 1 Scott, N. R. 287.

An infant is not liable for money lent, except it be

An infant, however, is not liable for money lent, though laid out in the purchase of necessaries: *Probart* v. *Knouth*, 2 Esp. 472, n., per *Buller*, J.,

1783. See 1 Salk. 279; Com. Dig. *Enfant* (C) 2; *Hedgley* v. *Holt*, 4 Car. & P. 104. But if one lends money to an infant to pay a just debt, the infant shall be liable to repay the money; for the lender stands in the place of the creditor for necessaries. So, if one borrows money during infancy, and applies it to the buying of necessaries, and afterwards, coming of age, devises his lands for payment of his debts, this debt, contracted during infancy, is within the trust: *Marlow* v. *Pitfield*, 1 P. Wms. 559. See also *Jenner* v. *Morris*, 3 De G., F. & J. 45; *Martin* v. *Gale*, 4 Ch. D. 428.

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applied in payment of a just debt.

An infant cannot accept a bill of exchange for necessaries: *Williamson* v. *Watts*, 1 Camp. 552. See likewise 1 Carth. 160; Com. Dig. *Enfant*, (C) 2; *Stevens* v. *Jackson*, 4 Camp. 164; *Thornton* v. *Illingworth*, 2 B. & C. 824; *Hunt* v. *Massey*, 5 B. & Ad. 902. And where an infant is party to a bill or obligation jointly with an adult, the latter may be sued alone: *Burgess* v. *Merrill*, 4 Taunt. 468; 3 Esp. 76, n.; *Haw* v. *Ogle*, 4 Taunt. 10; *Ashlin* v. *Langton*, 4 Moo. & Sc. 719; *Gillow* v. *Lillie*, 1 Scott, 597. An infant may *negotiate* an instrument, so as to pass a title to another, without rendering himself liable: *Taylor* v. *Croker*, 4 Esp. 187. It has been thought that an infant might bind himself by a promissory note for necessaries, by analogy to the ancient doctrine, that a single bill given by an infant for necessaries was binding. But there is a material distinction between a *single* bill and a promissory note; that the former was not negotiable, whilst promissory notes, since the statute of Anne, are upon the same footing as bills of exchange. As a promissory note, therefore, might be indorsed over, it seems that an infant would not be bound by such security, at least not whilst it is in the hands of an indorsee; and, in the hands of the person to whom it was originally made payable, it would probably be deemed to have no other qualities than a promissory note had before the statute of Anne, that of being *evidence* of a debt. See *Trueman* v. *Hurst*, 1 T. R. 40.

As to bills of exchange, &c.

An infant cannot state an account, even though

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the particulars of the account were for necessaries: *Trueman* v. *Hurst*, 1 T. R. 40; *Ingledew* v. *Douglas*, 2 Stark. 36; *Hedgley* v. *Holt*, 4 C. & P. 104; *Oliver* v. *Woodroffe*, 4 M. & W. 650.

Obligations to several persons.

Bond to several Obligees.]—Where there are divers obligees, if one release to the obligor, it bars them all: 2 Roll. Abr. 410, (D), pl. 1. So, if two executors sell the goods of the testator, and take an obligation for the money, the release of one of them shall bar both: Id. pl. 6; 18 Vin. Abr. 348; 5 Bac. Abr. 702, *Release*, (G). Therefore, in a bond it is not necessary to say that the payment may be made to the obligees, "or to one of them." If, by the words, "to one of them, or his certain attorney," &c., it is meant that the payment may be made to the survivor, or his executors, &c., the expression is useless, because the remedy necessarily survives.

If a bond be made to three, two cannot bring an action, unless the third is dead.

But, nevertheless, if an obligation be made to three, and two bring their action, they ought to show that the third is dead: Sid. 238, 240; 5 Bac. Abr. 163, Gwill. ed., *Obligations*, (D), 3. So, if an obligation be made to three to pay money to one of them, they must all join in the suit, for they are but as one obligee; and if he to whom the money is to be paid dies, the others must sue, although they have no interest in the sum contained in the condition: *Rolls* v. *Yates*, Yelv. 177. But it seems otherwise where the obligation is several. If the words "equally to be divided" be in the obligation, it is not a joint debt, but divided debts: *Shaw* v. *Sherwood*, Cro. Eliz. 729. The case of *Shaw* v. *Sherwood* was afterwards affirmed on a writ of error: *Whorewood* v. *Shaw*, Yelv. 25.

On a joint and several bond or covenant, the obligee may sue all jointly or any *one* separately.

Joint and several Bonds.]—If two or more bind themselves in an obligation jointly and severally, the obligee may sue all jointly, or any one of them, at his election; but if they are jointly, and not severally bound, the obligee must sue them jointly. It is for the purpose of enabling the obligee or covenantee to sue two or more of the obligors or covenantors alone, without joining the others, that the usual severance in an obligation, and in the lien part of a covenant, is made. Where the obligee in

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the joint and several bond of two obligors made one of the obligors his executor, it was held, that the bond was wholly discharged: *Cheetham* v. *Ward*, 1 Bos. & P. 630. So, if one of two joint and several obligors confesses a judgment on the bond, the remedy upon the bond is altogether gone: *Ex parte Christy*, 2 Dea. & Ch. 155. But an obligee may covenant not to sue one of two joint and several obligors, without discharging the other: *Dean* v. *Newhall*, 8 T. R. 168.

Without a joint severance of the obligation, two or more obligors cannot be jointly sued in the life of another joint, or joint and several obligor.

It has been justly observed by Mr. Justice *Buller*, that if *three* be bound jointly and severally in a bond or covenant, the obligee cannot sue *two* of them only, but he must either sue them all, or each of them separately: *Streatfield* v. *Halliday*, 3 T. R. 782. It is at the election of the obligee to consider such a bond either a joint or several one. If he sue one or each of the obligors, he acts upon it as a several bond. If he sue all of them, he proceeds upon it as a joint bond; see *Ex parte Rowlandson*, 3 P. Wms. 405. If he sue *two* only of the three, he still proceeds upon it as a joint bond; for he can only sue one or each of them upon a several bond. If the obligee elect to proceed upon it as a *joint* bond, there is no difference between suing *two* only of *three* joint obligors, and *one* only of *two* joint obligors.

Representatives of a deceased joint obligor are discharged at law.

If the bond be joint, and one of the obligors dies, his representatives are totally discharged at law, and the survivor or survivors only are chargeable. But it is otherwise if the obligors were bound jointly and severally: *Towers* v. *Moore*, 2 Vern. 99; 5 Bac. Abr. 164, Gwill. ed., *Obligations*, (D), 4. And the same rule applies to covenants.

Equitable liability of representatives of a deceased joint obligor.

In equity it was formerly held, that the representatives of a deceased joint obligor were liable: *Primrose* v. *Bromley*, 1 Atk. 90. But the present doctrine is otherwise; and makes the liability of the representatives depend upon the nature of the original transaction. Co-partnership debts form a class of cases in which such liability exists.

1st. Where the bonds were made joint only by mistake.

Some of the cases in relation to joint bonds by co-partners were decided on the ground that the bonds were filled up by the parties themselves;

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that they were ignorant of the distinction between a joint bond, and a joint and several bond; and that it was the intention of the parties, that the obligors should be severally, as well as jointly bound: therefore, the obligees were admitted creditors on the separate estates of the obligors: *Ex parte Symonds*, 1 Cox, 200; *Re Bate & Henckell*, cited 3 Ves. 400; *Re Freeman & Grace*, 3 Ves. 401; *Daniel* v. *Cross*, 3 Ves. 277. And in *Thomas* v. *Frazer*, 3 Ves. 399, it was admitted to have been the intention, that the bond should be in the common and usual form of bonds from two persons; the same, in effect, as the admission in the other cases. But the Court particularly noticed the additional circumstance, that there had been a previous promissory note for part of the debt; and observed that the bond was no better security than a note, unless it was a joint and several bond. For a partnership note from persons in trade would have all the effect that a joint bond would have. And therefore, in that case, one of the obligors being bankrupt, the personal and real assets of the other of them, who was dead, were held liable to the payment of the principal and interest. See also *Gray* v. *Chiswell*, 9 Ves. 125; *Burn* v. *Burn*, 3 Ves. 574; *Ball* v. *Dunsterville*, 4 T. R. 313. It appears that the cases of relief on joint bonds may be accounted for on the ground of mistake in the manner of framing the instrument; and it may be said that equity gives to them no other effect than it was the intention of the parties themselves to have given to them: *Underhill* v. *Horwood*, 10 Ves. 207, 227, 228.

2nd. In equity, partners and their representatives have been held severally liable, though the bond or note for partnership debt was joint.

However, it may be proper to observe further, that the common law, though it professes to adopt the *Lex Mercatoria*, nevertheless has not adopted it throughout, in what relates to partnership in trade. It holds, indeed, that, although partners are in the nature of joint tenants, there shall be no survivorship between them in point of interest; yet, with regard to partnership contracts, it applies its own peculiar rule; and, because they are in form joint, holds them to produce only a joint obligation, which consequently attaches exclusively upon the survi-

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vors; whereas, it is apprehended, by the general mercantile law, a partnership contract is several as well as joint. That may probably be the reason why Courts of Equity have considered contracts of this sort (that is, joint in form) as standing on a different footing from others: *Devaynes* v. *Noble*, 1 Mer. 564. Thus, in the case of *Lane* v. *Williams*, 2 Vern. 277, 292, the ground of the decree was, not that the partnership had given a note, but that the note was given for a partnership debt; and it was explicitly declared, that *quà* partners, the defendants were, each of them, liable for the partnership debt. In *Bishop* v. *Church*, 3 Atk. 691; 2 Ves. sen. 100, 371, though Lord *Hardwicke* doubted a little, at first, whether it sufficiently appeared that the bond was intended to be separate as well as joint; yet, when it was ascertained that the money had been borrowed in the course of the partnership dealing, he thought the equity was perfectly clear. In *Daniel* v. *Cross*, 3 Ves. 277, no doubt whatever appears to have been suggested with regard to this equity. The only question was, whether it had been waived by the subsequent dealings with the new house. See also *Jacomb* v. *Harwood*, 2 Ves. sen. 265; *Winter* v. *Innes*, 4 My. & Cr. 101; *Devaynes* v. *Noble*, *Sleech's case*, 1 Mer. 529; *Harris* v. *Farwell*, 15 Beav. 31; *Brown* v. *Gordon*, 16 Beav. 302; *Oakley* v. *Pasheller*, 4 Cl. & F. 207; *Simpson* v. *Hemming*, 10 Q. B. 406; *Swire* v. *Redman*, 1 Q. B. D. 537; *Bilborough* v. *Holmes*, 5 Ch. D. 255. It was decided in *Ex parte Kendal*, 17 Ves. 525, that there is no difference in principle between the case of a banking house and any other partnership as to the equity of a creditor against a deceased partner's estate (*e*).

(*e*) This case was originally heard before Sir W. Grant, M. R., and afterwards successively before Lord Eldon, Lord Lyndhurst, and Lord Brougham, on an appeal which was ultimately dismissed by Lord Brougham (2 Russ. & My. 495), and established the following points: viz., that money paid into a bank constitutes a debt, not a deposit; that the fact of a creditor leaving money in the hands of the surviving partners of a banking firm, does not constitute a new contract or a relinquishment of the old security; and that there is no rule that the creditors of a banking house shall make their demands for the balances within any

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The rule that a joint debt entails in equity a separate liability on each contractor, has been supposed to be confined to mercantile debts, but there is no such limitation: every joint *debt*, or other liability arising out of a transaction by which all the parties who are bound may be presumed to have been benefited, whether contracted by traders or by persons acting in a private capacity, is regarded in equity as joint and several. Thus in the case of *Thorpe* v. *Jackson*, 2 Y. & C., Ex. 553, where four persons who were not alleged to be traders, opened a joint account with a bank, and received advances on such account, it was held that the bankers were entitled to be paid out of the assets of one of the contractors who had died, although the insolvency of the survivors was not shown. See also *Braithwaite* v. *Britain*, 1 Keen, 206.

Thorpe v. *Jackson.*

Whether joint creditor can compete with separate creditors of deceased partner: rule in bankruptcy.

In bankruptcy, the well-known general rule is, that the joint creditors shall not be allowed to prove against the separate estate of the bankrupt partner in competition with the separate creditors; and that the separate creditors, in like manner, shall not compete with the joint creditors in the administration of the joint estate: *Twiss* v. *Massey*, 1 Atk. 67; *Ex parte Clay*, 6 Ves. 813; and see the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 40, sub-s. 3. The same rule is to some extent followed in the administration of the estate of a deceased joint contractor. See *Gray* v. *Chiswell*, 9 Ves. 118; *Cowell* v. *Sikes*, 2 Russ. 191; *Lodge* v. *Pritchard*, 1 De G. J. & S. 610.

Of course, if a creditor has been fraudulently induced to enter into dealings with the surviving partner alone, he will not be precluded from having recourse to the assets of the deceased partner: *Plumer* v. *Gregory*, L. R., 18 Eq. 621 (*f*).

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fixed period of time, or else be held to have waived their remedies against the estate of the deceased partner. See also *Wilkinson* v. *Henderson*, 1 My. & K. 582.

(*f*) A fuller discussion than is possible within the necessary limits of this work of the question of the remedies of creditors of a firm against a retired partner, or the estate of a deceased partner, will be found in Lord Justice Lindley's Treatise on the Law of Partnership and Companies, Book II. Chap. II. Sect. 3.

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Statute of Limitations.

At law, on the death of a joint contractor, the joint liability was severed as to him, and, therefore, in the case of a joint and several contract, no payment by one of the parties prevented the operation of the Statute of Limitations as between the survivors and the representatives.

What joint liabilities are not severed in equity.

It is not, however, every joint liability on contract that is severed in equity. In order to supply the want of an express severance, it must appear that the transaction on which the contract was founded was of a character that would naturally imply a several liability. Thus, in the case of *Sumner* v. *Powell*, 2 Mer. 30, Sir *Wm. Grant*, in delivering his judgment, said, "It has never been determined that every joint covenant is in equity to be considered as the several covenant of each of the covenantors. When the obligation exists only by virtue of the covenant, its extent can be measured only by the words in which it is conceived. A partnership debt has been treated in equity as the several debt of each partner, though at law it is only the joint debt of all. But, there, all have had a benefit from the money advanced, or the credit given; and the obligation to pay exists independently of any instrument by which the debt may have been secured. So, where a joint bond has in equity been considered as several, there has been a credit previously given to the different persons who have entered into the obligation. It was not the bond that first created the liability to pay. But in this case the covenant is purely matter of arbitrary convention, growing out of no antecedent liability in all or any of the covenantors to do what they have thereby undertaken."

Sumner v. *Powell.* Not a principle of equity, that every joint covenant shall be considered as joint and several.

Where intention appears on the face of the bond, it will be treated as joint and several, though only joint in form.

Wherever there are circumstances appearing *on the face of the bond*, to show that it was intended to be joint and several, though in point of form it be only a joint bond: it is a very proper subject for the interference of the Court: *Ex parte Symonds*, 1 Cox, 200; *Church* v. *King*, 2 My. & Cr. 220. Both in causes and in bankruptcy, where there has been a joint bond, the Court has sometimes inferred, from the nature of the condition and the transaction, that

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it was made joint by mistake; and has rectified it by decreeing in a cause that a new bond should be executed, joint and several: and as the Court would so decree in a cause, it has ordered in bankruptcy, that proof should be made accordingly: *Underhill* v. *Horwood*, 10 Ves. 207.

Describing a party to a joint bond, &c. as *surety*, does not make him severally liable.

It may be observed that the circumstance that in a joint bond or note one of the obligors or makers is described as surety, is not a sufficient ground for construing it as a several bond or note as to such party. Thus, where to secure the payment of a debt, a promissory note of the following tenor was given:—

"*Liverpool*, *June* 1*st*, 1820.

"Eighteen months after date we promise to pay to Messrs. O. & Co. 487*l.* 14*s.*, with lawful interest from the 14th of April last till paid, for value received.

"J. & J. E.,
"J. P. (Surety)."

It was contended that the nature of the transaction showed that the security was intended to be several as well as joint, and therefore that this case fell within the principle of those decisions in which the Court had relieved against mistakes by which obligations intended to be joint and several have been made joint only (*g*); but it was held otherwise: *Rawstone* v. *Parr*, 3 Russ. 424.

Effect where joint and several bond is not executed by one of the intended obligors.

If it be expressed in a bond, that two or more persons are jointly and severally bound, and one of them does not execute the bond, it is not the joint bond of those who executed it, but only the several bond of each; *Elliott* v. *Davies*, 2 Bos. & Pul. 338; but if there were a severance of the obligation, it seems that the obligation would be joint and several as to those who executed.

It seems that where several persons bind themselves in a given sum *each*, this is a several bond: *Collins* v. *Prosser*, 1 B. & C. 682.

(*g*) *Bishop* v. *Church*, 2 Ves. sen. 100, 371; *Thomas* v. *Frazer*, 3 Ves. 399; *Burn* v. *Burn*, 3 Ves. 573.

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It has been decided, that the taking off the seal of some of the obligors in a *several* bond, and substituting others, does not vitiate it, or destroy the remedy against the original obligees, whose seals remain: *Collins* v. *Prosser*, 1 B. & C. 682; though, according to several early cases, it is otherwise where the bond is *joint* and *several: Seaton* v. *Henderson*, 2 Lev. 220; *Nichols* v. *Haywood*, Dy. 54 a; *Michael* v. *Scocwith*, Cro. Eliz. 120.

Effect of removing seal from the bond of several.

Principal and Surety.]—In the absence of any express engagement a principal is liable upon an implied promise to indemnify his surety from any loss that he may sustain in that character: *Toussaint* v. *Martinnant*, 2 T. R. 100; *Pownall* v. *Ferrand*, 6 B. & C. 439. See *Duffield* v. *Scott*, 3 T. R. 374.

Surety when only simple contract creditor of principal.

A surety by specialty (*h*), who pays any moneys on account of the joint obligation of himself and his principal, becomes a simple contract creditor only of the latter: *Copis* v. *Middleton*, Turn. & R. 224. See *Robinson* v. *Wilson*, 2 Madd. 434; *Jones* v. *Davids*, 4 Russ. 277; *Hodgson* v. *Shaw*, 3 My. & K. 183. See *Robinson* v. *Gee*, 1 Ves. sen. 251, where the general creditors of a deceased principal were not allowed to throw the particular debt for which the surety had bound himself upon an estate which the principal and surety had mortgaged as a further security; the estate having been limited to the principal in tail with remainder to the surety in tail, and having devolved upon the surety on the death of the principal without issue.

Right of surety to assignment of securities.

But, although a surety may recover of the principal the sum he is obliged to pay, yet he cannot require an assignment of the bond for that purpose:

Contract of suretyship within the Statute of Frauds.

(*h*) By sect. 4 of the Statute of Frauds (29 Car. 2, c. 3) a promise to answer for the debt, default or miscarriage of another person is required to be in writing. Formerly, if such an undertaking was made by writing not under seal, the consideration for the promise must have appeared on the face of the writing; but now, by the stat. 19 & 20 Vict. c. 97, s. 3, a written guarantee is not to be invalid "by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document." But the promise cannot be explained by parol evidence: *Holmes* v. *Mitchell*, 7 C. B., N. S. 361.

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Gammon v. *Stone*, 1 Ves. sen. 339; as it would be of no use to him: *Woffington* v. *Sparks*, 2 Ves. sen. 569. For if the co-obligor in the bond paid it off, the principal might take advantage of it, and plead payment in bar of an action instituted by the plaintiff in the name of the obligee, as it must be: *Bishop* v. *Church*, 2 Ves. sen. 372; *Copis* v. *Middleton*, Turn. & R. 191. The bond being given for the payment of a sum of money, when it is once satisfied to the obligee it is *functus officio;* but payment by the representatives of a deceased joint obligor cannot be pleaded to an action against the survivor: *Bishop* v. *Church*, 2 Ves. sen. 100, 371. A surety is entitled to the assignment of any other bond or security than that which is discharged by his payment: *Hodgson* v. *Shaw*, 3 My. & K. 183; see also *Forbes* v. *Jackson*, 19 Ch. D. 615, and the cases there cited (*i*). But, if a surety pays money for a principal on a bond, having no counter-bond, an action lies for the surety to recover the money from the principal: *Woffington* v. *Sparks*, 2 Ves. sen. 570; *Hodgson* v. *Shaw*, 3 My. & K. 190. As to costs incurred by the surety, see *Bleaden* v. *Charles*, 5 Moo. & P. 14; *Seaver* v. *Seaver*, 6 Car. & P. 673; *Dawson* v. *Morgan*, 9 B. & C. 618.

Surety's right to collateral securities.

If there be on foot any collateral security given by the principal to the creditor, the surety may have the benefit of it: *Wright* v. *Morley*, 11 Ves. 12; *Boultbee* v. *Stubbs*, 18 Ves. 20; *Seabourne* v. *Powell*, 2 Vern. 11; *Lord Harberton* v. *Bennett*, Beatty, 386; *Mayhew* v. *Crickett*, 2 Swanst. 185; *Gaynor* v. *Royner*, 2 Madd. 437; *Stirling* v. *Forrester*, 3 Bli. O. S. 575. See also *Hodgson* v. *Shaw*, 3 My. & K. 183, where Lord *Brougham*, C., held that a surety will be entitled to every remedy which the creditor has against the principal debtor, to enforce every security and all means of payment; to stand in the

(*i*) The rule as to a surety's right to the benefit of securities extends to cases where the suretyship is created by indorsing and discounting a bill of exchange: *Duncan, Fox & Co.* v. *N. & S. Wales Bank*, 6 App. Ca. 1. A creditor is not entitled to the benefit of securities which the debtor has given to a surety: *Ex parte Waring*, 19 Ves. 345.

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place of the creditor, not only through the medium of contract, but even by means of securities entered into without his knowledge: having a right to have those securities transferred to him though there was no stipulation for it, and to avail himself of all those securities against the debtor.

Right of surety for Crown debtor to prerogative process.

A surety paying a debt to the Crown may have the benefit of the Crown process in the same cases in which an ordinary surety might have the benefit of a judgment at the suit of a subject—a case, however, that can seldom occur. See Savile, 30, pl. 72; *Att.-Gen.* v. *Chitty*, 1 Fowl. Exch. Pract. 104; *Rex* v. *Bennett*, Wightw. 1. No person, it should seem, is entitled to prerogative process, unless he is at the time a debtor to the Crown. If he has satisfied the Crown he cannot use its remedies; for the Crown cannot, it is said, be a trustee: 3 Swanst. 376; *Rex* v. *Bingham*, 2 Cr. & J. 130.

Surety's right to *subsequent* securities.

In an *Anonymous case*, cited 1 C. P. Coop. 616, it seems to have been the opinion of Lord *Gifford*, M. R., that the surety is entitled to the benefit of securities given by the debtor subsequently to the contract as much as to those given previously to it or at the same time; and this view is confirmed by the well-settled rule, that sureties are entitled to the benefit of securities of the existence of which they were ignorant when they contracted their liability. See, too, *Seabourne* v. *Powell*, 2 Vern. 11. But see *Copis* v. *Middleton*, Turn. & R. 230; *Wade* v. *Coope*, 2 Sim. 155; *Newton* v. *Chorlton*, 10 Ha. 646; *Steel* v. *Dixon*, 17 Ch. D. 825; *Forbes* v. *Jackson*, 19 Ch. D. 615. In the case of *Dowbiggen* v. *Bourne*, 2 Y. & C., Ex. 462, a bill by the administratrix of a surety against the creditor, asking an assignment of a judgment in an action against the principal (satisfaction having been levied in a separate action against the surety upon a joint and several note), was dismissed, the Court being of opinion that the judgment against the principal not being available at law by the creditors was not available in equity in the hands of a surety. See also 2 Wms. Saund. 148, n.; *Parsons* v. *Briddock*, 2 Vern. 608; *Wright* v. *Morley*, 11 Ves. 12; *Hodgson* v. *Shaw*, 3 My. & K. 183.

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Creditor releasing collateral security discharges surety.

So far has this right of the surety to the benefit of collateral securities been carried, that a creditor was held to have discharged the surety by destroying the remedy upon any collateral security which he had, whether within or not the knowledge of the surety when he became such: *Huberton* v. *Bennett*, Beatty, 386; see *Hodgson* v. *Shaw*, 3 My. & K. 191.

Appropriation of payments.

As to the appropriation of payments made by a debtor (which in general is at the option of the creditor), see *Kirby* v. *Marlborough*, 2 Mau. & S. 18; *Shaw* v. *Picton*, 4 B. & C. 715; *Williams* v. *Rawlinson*, 10 Moo. 362.

Composition by surety.

A surety, who has compounded with the creditor, cannot, by taking an assignment of the debt to a trustee for himself, or by any other means, entitle himself to recover more from his principal than the amount he has paid: *Ex parte Rushforth*, 10 Ves. 420; *Butcher* v. *Churchill*, 14 Ves. 567; *Reed* v. *Norris*, 2 My. & Cr. 361.

Contribution between co-sureties.

At law, one of several co-sureties in a bond might formerly recover against any one of the others his aliquot proportion of the money paid by him under the bond; regard being had to the number of sureties; *Cowell* v. *Edwards*, 2 Bos. & P. 268; see *Deering* v. *The Earl of Winchelsea*, 2 Bos. & P. 270; *Turner* v. *Davies*, 2 Esp. 478; *Browne* v. *Lee*, 6 B. & C. 689; *Wilson* v. *Cutting*, 4 Moo. & Sc. 268; *Stirling* v. *Forrester*, 3 Bligh, 575; but since only the aliquot part could be recovered from each surety if any of the sureties were insolvent, the plaintiff was to that extent deprived of his remedy. But, according to the present practice of the Courts, following the principles formerly adopted in equity, the insolvent co-sureties are struck out, and the rest are made to contribute equally. See *Peter* v. *Rich*, 1 Ch. Rep. 34: also cited Id. 151; *Hole* v. *Harrison*, 1 Ch. Ca. 246; Cas. tem. Finch, 15; *Swain* v. *Wall*, 1 Ch. Rep. 149; *Layer* v. *Nelson*, 1 Vern. 456; *Madox* v. *Jackson*, 3 Atk. 406; *Angerstein* v. *Clark*, 2 Dick. 738; *Lawson* v. *Wright*, 1 Cox, 275; *Cockburn* v. *Thompson*, 16 Ves. 321. The doctrine of contribution amongst sureties is not founded on contract, but on general principles of justice, on the

In equity, insolvent co-sureties are struck out, and the rest contribute equally.

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Contributions where sureties are bound by different instruments.

ground of equality of burthen and benefit. Therefore it makes no difference whether the sureties are jointly, or jointly and severally bound: nor will it make any difference if they are severally bound; and by *different* instruments, but for the *same* principal, and the *same* engagement; and though one person becomes a surety by a separate instrument, without the knowledge of another surety, it makes no difference: *Deering* v. *Earl of Winchelsea*, 1 Cox, 318; *Craythorne* v. *Swinburne*, 14 Ves. 160, 165, 169; *Whiting* v. *Burke*, L. R., 6 Ch. A. 342. There is, however, this distinction, that, where the sureties enter into separate bonds, the penalties of those distinct bonds will ascertain the proportion in which they are to contribute; but, if they join in one bond, then they must contribute equally: *Deering* v. *Earl of Winchelsea*, 1 Cox, 322. In *Mayhew* v. *Crickett*, 2 Swanst. 185, Lord *Eldon* says, "The right of contribution between sureties exists not only in cases where they are sureties by one and the same instrument, but also where they are constituted sureties by different instruments." And see his lordship's observations on the same case in *Craythorne* v. *Swinburne*, 14 Ves. at pp. 165, 169, 170; see also *Ware* v. *Horwood*, 14 Ves. 31. So, if one surety pays more than his proportion, there shall be a contribution for a proportion of the excess beyond the proportion which in all events he is to pay: *Ex parte Gifford*, 6 Ves. 808. But a surety who has not paid more than his share, cannot claim contribution from his co-sureties, although they have paid nothing: *Davies* v. *Humfreys*, 6 M. & W. 153; *Ex parte Snowdon*, 17 Ch. D. 44. Any security obtained by one of several co-sureties from the principal debtor will generally enure for the common benefit of all the co-sureties, even though the giving of such security may have been the condition on which the person taking it consented to become a surety, and though the other co-sureties may not have been aware that such security had been given: *Steel* v. *Dixon*, 17 Ch. D. 825. See also *Atkins* v. *Arcedeckne*, 24 Ch. D. 709.

If one surety pays more than his proportion, the others must contribute.

As to the question of contribution between

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partners, see Lindley on Partnership, Vol. I., ch. vi., p. 753 *et seq.*

Express contract may limit or avoid contribution.

Although the right of contribution among sureties does not spring from contract, yet contract may exclude it, *Pendlebury* v. *Walker*, 4 Y. & C., Ex. 424, or qualify it, as in *Swain* v. *Wall*, 1 Ch. Rep. 149. Therefore, as a party may by a special contract narrow his liability as co-surety, so he may by a special engagement contract so as not to be liable to contribute in any degree: *Craythorne* v. *Swinburne*, 14 Ves. 165. And where the debt was divided into two parts, and separate deeds of suretyship were taken from distinct sureties for each part, Lord *Eldon*, being of opinion that they were distinct transactions, held, that there was no right of contribution between the sureties: *Coope* v. *Twynam*, Turn. & R. 426. And where it was agreed that each surety should be answerable only for a given portion of the whole sum secured, the Court held, on the construction of the instrument, that there was no right of contribution among them: *Pendlebury* v. *Walker*, 4 Y. & C., Ex. 424: but see *Deering* v. *Lord Winchelsea*, 1 Cox, 322.

As to liability of subsequent surety to contribution.

A distinction is also to be observed upon the liabilities and rights of a co-surety, whether he is strictly so, or whether he is only in the nature of a surety for the principal and the other surety. Thus, if a person give a separate bond as a supplemental security for payment of a debt, in default of its being paid by the principal or his surety, under a former bond, he is not liable to contribution in favour of the first surety; such first surety being, as to the second surety, a principal: *Craythorne* v. *Swinburne*, 14 Ves. 160, 171. In *Turner* v. *Davies*, 2 Esp. 478, it was held that a surety who had become such at the solicitation of another surety, was not liable to him for contribution. See also *Crafts* v. *Tritton*, 2 Moo. 411.

Creditor giving time to principal, discharges surety.

With respect to principal and surety in a bond, if the creditor enters into a *binding* contract with the principal debtor to give him further time to pay, without the concurrence of the surety, the surety is discharged, because the creditor has put it out of his own power to enforce immediate payment, where

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the surety would have a right to require him to do so: *Bank of Ireland* v. *Beresford*, 6 Dow. 238; *Oakley* v. *Pasheller*, 4 Cl. & F. 207. And see *Nisbet* v. *Smith*, 2 Br. C. C. 579; *Rees* v. *Berrington*, 2 Ves. jun. 540; *Strong* v. *Foster*, 17 C. B. 219; *Oriental Financial Corporation* v. *Overend, Gurney & Co.*, L. R., 7 Ch. A. 142 (*h*). In *Eyre* v. *Bartrop*, 3 Madd. 221, it was held, that giving time to the principal, the grantee of an annuity, exonerates the surety from past, as well as future, arrears.

Eyre v. *Bartrop*.

Calvert v. *London Dock Company*.

Where a builder contracted to perform certain works for which he was to receive every two months three-fourths of the value of the work done, and the remainder when the whole was completed, it was held, that the parties for whom the work was to be done had released the sureties for the completion of it within a given time, by paying to the builder, while the undertaking was incomplete, more than three-fourths of the value of what was done. Their doing so might have afforded facilities to the contractor, but it removed one of his inducements to complete his contract, and thus altered the situation of the sureties: *Calvert* v. *London Dock Co.*, 2 Keen, 638. See *Hemming* v. *Trenery*, 2 Cr. M. & R. 385; *Tyson* v. *Cox*, Turn. & R. 395; *Whitcher* v. *Hall*, 5 B. & C. 269; *Small* v. *Currie*, 5 De G., M. & G. 141.

Parol agreement to give time.

A parol agreement for good consideration, to give time to the principal, being enforceable in equity, will discharge the surety in equity, although the principal is bound by deed: *Nisbet* v. *Smith*, 2 Br. C. C. 579; *Blake* v. *White*, 1 Y. & C., Ex. 420. A surety may bind himself to indemnify a co-surety by parol merely, such a promise not being within the Statute of Frauds: *Thomas* v. *Cook*, 8 B. & C. 728.

To discharge the surety, there must be a positive contract.

There must be a distinct and binding contract to give time in order to discharge the surety: *Heath* v. *Key*, 1 Y. & J. 434. An agreement without consideration is not binding, and will not discharge the

(*h*) For a full discussion of this question see the notes to *Rees* v. *Berrington*, in Tud. L. C. Eq., vol. 2, pp. 992 *et seq.*

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surety: *Blake* v. *White*, 1 Y. & C., Ex. 420; *Clarke* v. *Wilson*, 3 M. & W. 208; *Lyon* v. *Holt*, 5 M. & W. 250; *Tucker* v. *Laing*, 2 K. & J. 749. Where the creditor was the East India Company and their officers paid a balance to the debtor under an erroneous settlement of account, it was held that the sureties were discharged. *Arden*, M. R., said "It cannot be contended, upon any principle that prevails with regard to principal and surety, that where the principal has left a sufficient fund in the hands of the obligee, and he thinks fit instead of retaining it in his hands to pay it back to the principal, the surety can ever be called upon:" *Law* v. *East India Company*, 4 Ves. 824.

Taking a further security from principal.

Neither a contract with a *stranger* to give time to the principal debtor, nor the taking a further security from the principal (*i*), will discharge the surety, provided the creditor's remedy under the existing security be not thereby suspended: *Frazer* v. *Jordan*, 8 El. & B. 312. See also *Twopenny* v. *Young*, 3 B. & C. 208; *Emes* v. *Widdowson*, 4 Car. & P. 151; *Norris* v. *Aylett*, 2 Camp. 329; *Croydon Commercial Gas Co.* v. *Dickinson*, 2 C. P. D. 46. Upon the same principle the acceptance of a new bill as a collateral security, from the acceptor of a bill of exchange, does not discharge the drawer: *Pring* v. *Clarkson*, 1 B. & C. 14; *Bedford* v. *Darkin*, 2 B. & Al. 210. As to how far a mercantile custom will justify extension of time when the guarantee is not expressly limited in respect of time, see *Coombe* v. *Woolf*, 1 Moo. & Sc. 241. See also *Howell* v. *Jones*, 1 Cr., M. & R. 97; *Pidcock* v. *Bishop*, 3 B. & C. 605; *Simpson* v. *Manley*, 2 Cr. & J. 12; *Hall* v. *Hadley*, 2 Moo. & P. 137.

Effect of the creditor's delay to sue the principal.

And the mere neglect or delay of the creditor to pursue his remedies against the principal, though coupled with the circumstance of taking an additional security, will not, it seems, form a ground for

(*i*) The giving of additional security by the principal debtor to the creditor is not, *per se*, a giving of time to the principal: *Overend, Gurney & Co.* v. *Oriental Financial Corporation*, L. R., 7 H. L. 348.

exonerating the surety: *Trent Navigation* v. *Harley*, 10 East, 34; *M'Taggart* v. *Watson*, 3 Cl. & F. 541; *Heath* v. *Key*, 1 Y. & J. 434. Thus a bill in equity was filed by a surety to be relieved from the payment of a bond debt, on the ground that the creditor had suffered five years to elapse without having taken any means to obtain payment from the principal, who, in the meantime, became insolvent, and fled the country. It was also alleged, that the creditor had discharged the surety, by taking the principal's bond alone for the money. It was determined, however, that these circumstances did not exonerate the surety: Lord *Lyndhurst* observing, that "the surety has no right to say that he is discharged from the debt which he has engaged to pay, together with the principal, if all that he rests upon is the passive conduct of the creditor in not suing. He must himself use diligence, and take such effectual means as will enable him to call on the creditor, either to sue, or to give him (the surety) the means of suing:" *Eyre* v. *Everett*, 2 Russ. 381. See also *Wright* v. *Simpson*, 6 Ves. 734; *Mayhew* v. *Crickett*, 2 Swanst. 191; *Warrington* v. *Furbor*, 8 East, 242; *Van Wart* v. *Woolley*, 3 B. & C. 439.

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It does not appear that, in *Eyre* v. *Everett*, the surety had expressly called upon the creditor to sue the principal. Lord *Thurlow* seems to have thought, in *Ex parte Mure*, 2 Cox, 74, that, in such a case, the creditor would be responsible; but his lordship observed, that there was no pretence for equity in the case of sureties, if they lie by. It certainly would not be safe for a creditor to forbear to sue after receiving notice from a surety, calling upon him to do so; though, it is to be observed, in regard both to the surety and the mortgagor of a debt, that he has always the means of taking the remedy into his own hands, by paying the debt. If, however, any of the securities for a debt be lost by the negligence of the creditor, the surety is *pro tanto* discharged: *Wulff* v. *Jay*, L. R., 7 Q. B. 756. As to the construction of a stipulation that the creditor shall first enforce his securities against the principal,

Security lost by creditor's negligence.

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see *Hall* v. *Hadley*, 4 Nev. & M. 505; *Muskett* v. *Rogers*, 8 Scott, 51.

Surety may compel principal to pay.

A surety may compel the principal to relieve him from his liability, by payment of the debt as soon as it is due: see *Ranelagh* v. *Hayes*, 1 Vern. 189; 1 Eq. Ab. 76; *Rees* v. *Berrington*, 2 Ves. jun. 542; *Antrobus* v. *Davidson*, 3 Mer. 569, 579; *Flight* v. *Cook*, 2 Ves. sen. 619; *Wright* v. *Simpson*, 6 Ves. 734. But a *ne exeat regno* was refused against a principal who had promised to give an indemnity to the surety, the application being made before the debt was due: *Cock* v. *Rivers*, 6 Ves. 283; *Shaftoe* v. *Shaftoe*, 7 Ves. 173.

Assent of surety to giving time.

If the time be given to the principal with the knowledge and assent of the surety, of course the latter is not discharged: *Tyson* v. *Cox*, Turn. & R. 395; *Clark* v. *Dewlin*, 3 Bos. & P. 363; *Stevens* v. *Lynch*, 12 East, 38; *Withall* v. *Masterman*, 2 Camp. 179. And the *subsequent* assent of the surety to the arrangement will revive his liability: *Smith* v. *Winter*, 4 M. & W. 454; *Mayhew* v. *Crickett*, 2 Swanst. 189.

Creditor may, in giving time to principal, reserve his remedies against the surety.

But it is clearly competent to a creditor, in giving time to the principal, to reserve his remedies against the surety: *Maltby* v. *Carstairs*, 7 B. & C. 737; see *Thomas* v. *Courtnay*, 1 B. & Al. 1; *Harrison* v. *Courtauld*, 3 B. & Ad. 39; *Oakley* v. *Pasheller*, 10 Bligh, 576; *S. C.*, 4 Cl. & F. 207; the effect of which is, to qualify the agreement to give time; for, if the creditor sues the surety, the latter would have an immediate right of action against the principal, so that by this means the debtor becomes liable to the debt before the extended time: See *Kearsley* v. *Cole*, 16 M. & W. 135. The reservation in question virtually therefore is a declaration that, though I (the creditor) will not sue you (the debtor) before a given time, I will not preclude myself from immediately suing the surety, and thereby indirectly bringing the demand upon you at an earlier period. The intention, however, to reserve the remedies against the sureties must be clearly expressed; as to which see *Boultbee* v. *Stubbs*, 18 Ves. 20; *Ex parte Harvey*, *Re Blakely*, 4 De G. M. & G. 881.

But the intention must be unequivocally expressed.

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In the case of *Ex parte Carstairs*, Buck, 560, it was determined that the sureties were not discharged, this being, upon the construction of the deed by which time was given to the debtor (and which was very long and intricate), the apparent intention of the parties. This intention, however, must appear on the face of the deed; parol evidence is not admissible. So in the case of *Ex parte Glendinning*, Buck, 517, Lord *Eldon* said, "It is now perfectly understood, that, unless the creditor reserve his remedies, he discharges the surety by compounding with the principal; and the reservation must be upon the face of the instrument by which the parties make the compromise; for evidence cannot be admitted to explain or vary the effect of the instrument."

Parol evidence of intention is inadmissible.

A release by a creditor of one of several joint co-sureties releases all: *Cheetham* v. *Ward*, 1 Bos. & P. 633. See also *Nicholson* v. *Ravill*, 4 A. & E. 683. But when two or more sureties contract severally, the creditor may release one without releasing the other or others: *Ward* v. *National Bank of New Zealand*, 8 App. Ca. 755.

Release of co-surety.

Where B. and C. were joint sureties for A., whose wife, D., charged her separate estate with an indemnity to B. from the consequences of his suretyship, and B. bore all the loss, and then, without D.'s concurrence, released his co-surety, C., it was held that D.'s estate was discharged, for she had a right to the benefit of contribution from C.: *Hodgson* v. *Hodgson*, 2 Keen, 704.

However, where a bond was executed by an insurance broker, as the principal obligor, and two sureties; with a condition, that, if they should pay the obligees certain premiums which should become due for such assurances on ships at sea, as should be made with the obligees by the insurance broker, within six months after the making the assurances, the bond was to be void. The broker became bankrupt, and was indebted to the obligees in a considerable sum for premiums; and they received a dividend of six shillings in the pound, under the commission. The premiums were due three years before the bankruptcy, and the obligees

The laches of obligee does not always discharge surety.

Dividend received under principal's bankruptcy deducted, as against sureties, from penalty of bond.

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did not call on the sureties until after the bankruptcy. Held, first, that the sureties were not discharged by the laches of the obligees in suffering the credit of the broker to run on so long beyond the six months stipulated by the bond; and secondly, that the dividend received by them under the commission, was to be deducted, as against the sureties, from the penalty contained in the bonds: *London Assurance Company* v. *Buckle*, 4 Moore, 153.

Payment on release of principal debt.

The payment or composition or release of the principal debt will necessarily discharge the surety; *Webb* v. *Hewitt*, 3 K. & J. 444; unless the creditor expressly reserves on the face of the deed of composition or release his remedies against the surety; *Green* v. *Wynne*, L. R., 4 Ch. A. 204; or unless the instrument by which the suretyship is created expressly provides that the release of the principal debt is not to discharge the surety: *Union Bank of Manchester* v. *Beech*, 3 H. & C. 672. The test in all such cases is whether or not the rights and remedies of the surety are in any way prejudiced by the release. See *Price* v. *Barker*, 4 El. & B. 779; *Owen* v. *Homan*, 4 H. & C. 1037; *Cragoe* v. *Jones*, L. R., 8 Ex. 81; *Polak* v. *Everitt*, 1 Q. B. D. 669.

Release of principal after further security by surety.

Although a release to the principal is generally a release to the surety, yet if the surety has, previously to the release given to his principal, paid part of the debt, and given a security for the remainder, the general rule does not apply, but the creditor, notwithstanding the release, will, in the absence of evidence to the contrary, retain his right against the surety for the remainder of the debt: *Hall* v. *Hutchons*, 3 My. & K. 426. In such case, the surety will, of course, have his remedy against the principal.

Right of joint principal debtors as against creditor with notice to be treated as principal and surety.

It may be observed that the giving of time to one of two joint principal debtors does not release his co-principal, and that it is not competent for two joint debtors by arrangement between themselves to create between them a new relation of principal and surety, so as to deprive a creditor, even with notice, of his right to treat them both as principal debtors, unless he concurs in the arrangement: *Swire* v. *Redman*, 1 Q. B. D. 536.

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Penalties of Bonds.]—The penalty of a bond for payment of money is generally double the amount of the principal sum to be thereby secured. If the money be not paid at the time limited in the condition, the bond becomes forfeited, or absolute at law. On the forfeiture of a bond, the whole penalty was formerly recoverable at law; but the Courts of Equity interposed, and would not permit a man to take more than in conscience he ought; namely, his principal, interest, and expenses. And the statute 4 & 5 Ann. c. 16, ss. 12, 13, enacted, that, in case of a bond conditioned for the payment of money, the payment or tender of the principal sum due, with interest and costs, even though the bond be forfeited and a suit commenced thereon, shall be a full satisfaction and discharge. See *Lord Lonsdale* v. *Church*, 2 T. R. 388; *Wilde* v. *Clarkson*, 6 T. R. 303. And subsequently it has been provided by the stat. 8 & 9 Will. 3, c. 11, that in actions on bonds, or on any penal sum, the plaintiff shall assign as many breaches as he pleases: and jury may assess damages for any injury which the plaintiff may have sustained. On payment of the charges so assessed execution may be stayed; but in each case the judgment shall notwithstanding remain as a further security to answer to the plaintiff such damages as he may sustain by any further breach of covenant contained in the same indenture, deed, or writing.

Where penalty is forfeited, tender of principal, interest, and costs, is a full satisfaction.

To what instruments the statute extends.

This statute is compulsory on plaintiffs: *Hardy* v. *Bern*, 2 T. R. 540, and was meant to meet the case of non-performance of covenants and agreements secured by bonds or indentures, and which covenants are to be performed at different times, or the monies paid by instalments; and extends as well to bonds with conditions thereunder written for the performance of any thing contained therein (for the condition of the bond is an agreement in writing), and to penalties on articles of agreement, or the like, for the non-performance of covenants or agreements contained in the same articles, &c., as to covenants and agreements contained in another indenture, deed, or writing: *Collins* v. *Collins*, 2 Burr. 824, 826.

What bonds are, and what

A bond conditioned for the payment of an an-

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not, within the statute.

nuity: *Walcott* v. *Goulding*, 8 T. R. 126; or of money by instalments: *Willoughby* v. *Swinton*, 6 East, 550; or a bond conditioned to perform an award: *Welch* v. *Ireland*, 6 East, 613; is within the statute. But the provisions of the statute do not extend to post obit bonds: *Stair* v. *Earl of Murray*, 2 B. & C. 82; or other bonds conditioned for the payment of money, which are provided for by the statute of 4 & 5 Anne, c. 16; nor to bail: *Moody* v. *Pheasant*, 2 Bos. & P. 446: or replevin-bonds: *Smith* v. *Bond*, 3 Moo. & Sc. 528. Neither does it extend to common money bonds, against the penalty of which the Courts can give relief by statute 4 & 5 Anne, c. 16, s. 13: *Murray* v. *Earl of Stair*, 2 B. & C. 82. And where judgment is entered up on a warrant of attorney for securing money by instalments, it is not within the statute, although a bond be also given: *Shaw* v. *Marquis of Worcester*, 4 Moo. & P. 21. A bond conditioned for the payment of a sum at the end of five years, with interest in the meantime half-yearly, and a proviso that on default of payment of interest, the principal shall become payable, is not within the statute: *James* v. *Thomas*, 5 B. & Ad. 40. A bond for payment of a sum certain, but which by indenture of even date was made subject to an agreement, that the obligees might sue and proceed to judgment and execution whenever they should think fit; the judgment to be a security for the payment to them, on demand, of all sums then and thereafter to become due to them, was held to be within the statute: *Hurst* v. *Jenning*, 5 B. & C. 560. As to what damages, not actually sustained, must be assigned, see *Harrop* v. *Armitage*, 12 Price, 441. The statute does not apply to actions at the suit of the Crown: *Rex* v. *Peto*, Y. & J. 171.

Damages must not exceed amount of penalty and costs.

In *Lord Lonsdale* v. *Church*, 2 T. R. 389, it was held, that in an action on a bond, damages may be recovered for more than the penalty. But in *Wilde* v. *Clarkson*, 6 T. R. 303, Lord *Kenyon* said, "The defendant is willing to pay the whole penalty and the costs of the action, and the plaintiff is not entitled to more. In actions or bonds, or on any penal sums for performance of covenants, &c., the Act of Parliament (8 & 9 Will. 3, c. 11, s. 8)

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expressly says that there shall be judgment for the penalty, and that the judgment shall stand as a security for further breaches; but the obligor is not answerable, in the whole, beyond the amount of the penalty."

So, in *Brangwin* v. *Perrot*, 2 W. Bl. 1190, which was a bond to indemnify a parish against a bastard child, the Court made a like order, that, upon payment of the penalty and costs into Court, the defendant should be relieved from the bond. See also *Wilde* v. *Clarkson*, 6 T. R. 303. The obligee cannot recover more damages against the obligor for a breach of the condition of the bond, than the amount of the penalty and costs, for the bond ascertains the extent of the damage by consent of the parties; if, therefore, the defendant pays the plaintiff the whole stated damages, he cannot desire any more. Therefore, if a bond be conditioned for performance of any act, and the obligee, by reason of the obligor's non-performance, sustains a damage far exceeding the amount of the penalty, yet he can only recover to the extent of the penalty and costs: *Clarke* v. *Seton*, 6 Ves. 414. But in an action on a judgment on a bond, interest may be recovered in damages beyond the penalty of the bond: *M'Clure* v. *Dunkin*, 1 East, 436.

Where condition is broken, obligee may obtain judgment for the whole penalty.

Where a bond is given to secure a principal sum by instalments, and default is made in payment of any one of the instalments at the time appointed, as the condition is broken, the obligee may bring an action, and obtain judgment for the whole penalty; though the Court, it seems, would prevent his taking execution for more than is due: *Darby* v. *Wilkins*, 2 Stra. 957; *Masfen* v. *Touchet*, 2 W. Bl. 706; *Talbot* v. *Hodson*, 7 Taun. 251. Where the plaintiff lent money to a person upon a bond executed by the borrower as principal and by the defendant as surety, under which the loan was to be repayable by instalments, and it was provided that the balance of the instalments should at once become payable on default in payment of any instalment: it was held that this provision was not of the nature of a penalty, but that on default being made in payment of one of the instalments, the plaintiff was entitled to recover

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the whole of the balance: *Protector Endowment Loan Co.* v. *Grué*, 5 Q. B. D. 592; see also *Sterne* v. *Beck*, 1 De G. J. & S. 595; *Thompson* v. *Hudson*, L. R., 4 H. L. 1.

Payment of penalty into Court discharges defendant from further liability.

In an action for a single breach of a bond, as in the case of a bastardy bond, if the defendant pays the whole penalty into Court, with costs, he is discharged from any further liability; for the bond ascertains the damage by consent of the parties, and therefore, if the defendant pays the plaintiff the whole stated damages, he cannot desire any more: *Wilde* v. *Clarkson*, 6 T. R. 305. So on a bond conditioned for the payment of a rent by a third person, the defendants are not, as sureties, liable for more than the whole penalty: *White* v. *Sealy*, 1 Dougl. 49. But where there is an agreement, and a penalty for breach of it, the party bound cannot elect to pay the penalty and so discharge himself of his agreement; but it is in the option of the other party whether he will enforce the contract or accept the penalty: *Hardy* v. *Martin*, 1 Cox, 26; *Logan* v. *Weinholt*, 1 Cl. & F. 611; *Davies* v. *Penton*, 6 B. & C. 216. So a breach of a covenant not to carry on a particular trade within specified limits under a penalty to be paid by way of liquidated damages will be restrained by injunction: *Jones* v. *Heavens*, 4 Ch. D. 636. Of course, if the obligee has a right of action or security independently of the bond, he will not be limited in that remedy to the amount of the penalty of the bond. Thus, where there is an agreement to pay a sum of money, and a penalty for non-performance which penalty is less than the sum that actually becomes due, the larger sum may be recovered on the deed: *Ingledew* v. *Cripps*, 2 Ld. Raym. 814. So, generally, damages may be recovered for non-performance of a covenant, although there is a penalty, but not where the damages are liquidated: *Winter* v. *Trimmer*, 1 W. Bl. 395; *Harrison* v. *Wright*, 13 East, 343.

Bond by surety for payment of rent, is only a security to the amount of penalty.

Party cannot elect to pay the penalty instead of performing the contract.

Interest beyond the penalty.

When money is secured by bond only, the penalty is the debt: *Clarke* v. *Seton*, 6 Ves. 415; and, therefore, a bond creditor cannot recover interest which with the principal will extend beyond the penalty of the bond: *Wilde* v. *Clarkson*, 6 T. R. 303; *Tunstall*

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v. *Trapps*, 3 Sim. 286; *Hughes* v. *Wynne*, 1 Myl. & K. 20; *Walters* v. *Meredith*, 3 Y. & C. Ex. 264; except under special circumstances as, it seems, where the amount of the sum secured and the penalty is the same: *Francis* v. *Wilson*, 1 Ry. & M. 105. The same principle is applicable to bonds given to secure annuities, the arrears of which cannot be recovered beyond the penalty: *Butcher* v. *Churchill*, 14 Ves. 575.

Interest may be recovered beyond the penalty, in an action on a judgment on the bond.

For instance, if a *judgment* be recovered on a bond, then, in an action on the judgment, interest may be recovered in damages beyond the penalty of the bond; and in this respect there is no difference between a foreign judgment (*e. g.* a judgment recovered in Ireland, &c.) and a judgment in a Court of record here: *M'Clure* v. *Dunkin*, 1 East, 436: see *Arnott* v. *Redfern*, 11 Moo. 308; *Barn* v. *Dalzell*, 3 Car. & P. 379. So, in equity, interest beyond the penalty was allowed to a judgment creditor, trustee in possession, under the will of his debtor, and as such applying the whole of the rents in the discharge of other debts, and not retaining any part of his own debt: *Atkinson* v. *Atkinson*, 1 Ball. & B. 238. Where a bond is only a collateral security, interest may be carried beyond the penalty: *Kerwin* v. *Blake*, 14 Vin. Abr. 460, pl. 4. But interest will not be allowed beyond the penalty, where there has been no demand for many years: *Galway* v. *Russell*, 14 Vin. Abr. 460, pl. 2; see also *Anderton* v. *Arrowsmith*, 2 Per. & D. 408.

Interest on judgment.

Now, by the statute 1 & 2 Vict. c. 110, s. 17, interest at four per cent. from the time of entering up a judgment (or from the commencement of the act) as against the debtor, and from time of registering the judgment as against the interests of purchasers, mortgagees, and creditors, in the debtor's lands (s. 19), may be levied in execution upon the judgment. The clause only applies to judgments at law, and by the subsequent enactment of the stat. 2 & 3 Vict. c. 11, s. 5, is inoperative against purchasers and mortgagees without notice. Interest cannot be recovered under this clause upon an unregistered judgment, as against a purchaser, mortgagee, or creditor with notice of the judgment: Stat. 3 & 4 Vict. c. 82, s. 2, *ante*, Vol. I. p. 105.

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See further, as to interest on judgments, *ante*, Vol. I. p. 689.

Difference between *penalties and liquidated damages.*

Penalties and Liquidated Damages.] — In actions brought for the breach of covenants and agreements, there has sometimes been a difficulty in distinguishing between penalties and liquidated damages. The fair result of the cases seems to be this—

1. Where a sum of money, whether in the name of a penalty or otherwise, is introduced in a covenant or agreement, merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed or contract, and the penalty only as accessory, and therefore only to secure the damage really incurred.

2. Where a deed contains covenants, or an agreement contains provisions, for the performance of several things, and then a large sum is stated, not for non-performance of any particular thing, but generally to be paid upon the breach of performance, that must be considered as a penalty: *Astley* v. *Weldon*, 2 Bos. & P. 346; *Kemble* v. *Farren*, 6 Bing. 141 (*a*); *Re Newman*, 4 Ch. D. 724. But whenever the sum mentioned in any instrument must, from the express language of the instrument or from necessary implication, be considered as the ascertained or liquidated damages agreed to be paid by one party to the other on the happening of a particular event, or the performance or omission of a particular act, the sum is not a penalty: *Harrison* v. *Wright*, 13 East, 343; *Shackle* v. *Baker*, 14 Ves. 468; *Fletcher* v. *Dyche*, 2 T. R. 32.

3. Where the payment of a smaller sum is secured by a larger, it is a penalty: *Aylet* v. *Dodd*, 2 Atk. 239; *Davies* v. *Penton*, 6 B. & C. 223.

4. The Court will relieve against a penalty upon a compensation: but where there is a covenant in a deed to pay a particular liquidated sum (for a particular act or class of acts), the Court cannot make a new covenant for a man, nor is there any room for compensation or relief; as in leases, containing covenants for ploughing up a meadow. If the cove-

(*a*) See this case stated, *infra*, p. 300.

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nant be "not to plough," and there be a penalty, the Court will relieve against the penalty, and direct an issue of *quantum damnificatus*, and the extent of the injury will be the measure of damages which the plaintiff will recover. But if it be worded to pay 5*l.* an acre for every acre ploughed up, there is no alternative; no room for any relief against it; no compensation; it is the substance of the agreement: *Lowe* v. *Peers*, 4 Burr. 2229; *Aylet* v. *Dodd*, 2 Atk. 239; *Farrant* v. *Olmius*, 3 B. & Al. 692. The use of the word "penalty" is not material: *Jones* v. *Green*, 3 Y. & J. 304, *infra*, p. 300.

5. Where the precise sum, therefore, is not of the essence of the agreement, the quantum of damages may be assessed by a jury; but where the precise sum has been fixed and agreed upon by the parties, that very sum is the ascertained and liquidated damage; the jury are confined to it, and the plaintiff cannot recover beyond it. For example, where a stipulated sum has been claimed for breach of an agreement on a dissolution of a partnership on the sale of a business not to compete with the continuing partner or purchaser, in which case it might not be possible to ascertain precisely what damages the person in respect to whom the contract is broken has sustained, and therefore the contracting parties agree to pay a stipulated sum: in such case, the sum stipulated is, by the convention of the parties, the *real* debt, and becomes due *in integro*, on a breach of the contract: *Atkyns* v. *Kinmar*, 4 Exch. 784; *Galsworthy* v. *Strutt*, 1 Exch. 663; *Crisdee* v. *Bolton*, 3 Car. & P. 243.

6. But in all articles containing *penalties*, as distinguished from liquidated damages, there are two remedies, either of which may be pursued at the option of the party injured; for, as often as the articles are broken, he may have, *toties quoties*, an equitable relief, upon the articles themselves, for a partial breach of contract; or he may take the penalty. That is to say, where the penalty is contained in any other instrument than a bond, or rather wherever the penalty is associated with a contract of as high a nature to do or forbear the act in question; which contract may be contained in a bond

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as well as in any other instrument, damages may be recovered against it: *Winter* v. *Trimmer*, 1 W. B. 395; *Harrison* v. *Wright*, 13 East, 342; for the plaintiff has his option to sue either for the penalty, or for the breach of contract.

Barton v. *Glover.*

Where the sum is considered as liquidated damages, and an action is brought to recover it, it seems that the jury are bound by the agreement of the parties to give that sum: *Barton* v. *Glover*, Holt, 43.

Whether the word "penalty" excludes liquidated damages.

The word "penalty," used in the agreement, will not prevent the sum mentioned from being considered as liquidated damages; and conversely, it is clear that the words "liquidated damages" are of themselves insufficient to make that not a penalty which in substance is such. So, in *Jones* v. *Green*, 3 Y. & J. 304, *Alexander*, C. B., said, "I do not care whether the expression 'penalty' or 'stipulated damages' is used; it is the substance of the thing for which the payment is intended to be made." See also *Smith* v. *Dickenson*, 3 Bos. & P. 630.

Where the expressions are contradictory, the Court it seems, will lean in favour of the construction which treats the sum named as a penalty only, and not as fixing the measure of the damages, such a construction being most consistent with justice: *Davies* v. *Fenton*, 6 B. & C. 216.

Liquidated damages can only be for particular defaults.

A *general* clause, directing the payment of a specific sum, by way of liquidated damages, on the breach of any one of a series of covenants, is now established to be nugatory. And a provision assigning the same measure of liquidated damages for the breach of any one of a series of covenants of different degrees of importance will be regarded as merely imposing a penalty.

Kemble v. *Farren.*

Thus, where the defendant, by an agreement in writing entered into with the plaintiff, agreed to act at the Theatre Royal, Covent Garden, for four seasons, and also to conform to the usual regulations of the theatre; and the plaintiff agreed to pay him 3*l.* 6*s.* 8*d.* every night on which the theatre should be open. And the agreement contained a clause, that, if either of the parties should neglect or refuse to fulfil the said agreement, or any part thereof, or any stipulation therein contained, such party should

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pay to the other the sum of 1,000*l.*; to which sum, it was thereby agreed, that the damages sustained by any such omission, neglect, or refusal, should amount; and which sum was thereby declared by the said parties to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof. The breach alleged in the declaration was, that the defendant refused to act during the second season. *Tindal*, C. J., remarked:—"It is, undoubtedly, difficult to suppose any words more precise or explicit than those used in this agreement, the same declaring, not only affirmatively, that the sum of 1,000*l.* should be taken as liquidated damages, but negatively also, that it should not be considered as a penalty, or in the nature thereof. And if the clause had been limited to breaches which were of an uncertain nature and amount, we should have thought it would have had the effect of ascertaining the damages upon any such breach at 1,000*l.*; for we see nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree. In many cases such an agreement fixes that which is almost impossible to be accurately ascertained; and in all cases it saves the expense and difficulty of bringing witnesses to that point. But, in the present case, the clause is not so confined; it extends to the breach of any stipulation by either party. If, therefore, on the one hand, the plaintiff had neglected to make a single payment of 3*l.* 6*s.* 8*d.* per day: or, on the other hand, the defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been contended, that the clause in question, in either case, would have given the stipulated damages of 1,000*l.* But that a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms, the case being precisely that in which Courts of equity have always relieved, and against which Courts of law have in modern times, endeavoured to relieve, by

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directing juries to assess the real damages sustained by the breach of the agreement: *Kemble* v. *Farren*, 6 Bing. 141.

The principle upon which this case was decided was commented upon by Lord *Westbury* in *Thompson* v. *Hudson*, L. R., 4 H. L. at p. 30, where his lordship remarked, "If the sum described as liquidated damages be a large sum, and the title to that sum is to arise upon some very trifling consideration, then it follows plainly that the large sum named never could have been meant to be the real measure of damages . . . . and, therefore, was properly regarded as in the nature of a penalty." See also *Charrington* v. *Laing*, 6 Bing. 242; *Astley* v. *Weldon*, 2 Bos. & P. 346; *Betts* v. *Burch*, 4 H. & N. 506; *Magee* v. *Lovell*, L. R., 9 C. P. 107; *Re Newman*, 4 Ch. D. 724.

Conclusion from the cases.

The conclusion to be drawn from these cases is, that a covenant to pay a sum of money as liquidated damages on the breach of any one of a series of stipulations must in all cases be nugatory, as the covenant necessarily embraces acts of various degrees of importance, all which cannot, with equal justice, be compensated for by the payment of the same sum. If it were sufficient in regard to some, it must be excessive as to others. The consequence is, that, in order to give an effectual remedy for the recovery of a sum of money as stipulated damages, in such a case, a distinct and separate amount should be assessed as the measure of compensation on the breach of each several covenant.

Boys v. *Ancell.*

In *Boys* v. *Ancell*, 7 Scott, 364, the defendant covenanted that he and the other parties named, of the same part (who did not execute the deed), would within a certain time grant a lease to the plaintiff, with the usual covenants; and the plaintiff covenanted to accept the lease, and execute a counterpart and pay the expenses of making the agreement, and the lease and counterpart; "and for the true performance of the agreement, each of the parties bound himself unto the other in the *penalty* of 500*l.*, to be recovered against the defaulter as *liquidated damages*." It was held to be a penalty. Per *Tindal*, C. J.—"It appears to me to be perfectly clear that

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the parties must have intended, that this sum of 500*l.* should be a penalty only, and not liquidated damages: for it would not only attach on the defendant's refusal to grant the lease, but also on the plaintiff's refusal to pay the expenses of preparing the lease and counterpart; and it would be absurd to suppose that the parties could have contemplated a penalty so unequal." See *Horner* v. *Graves*, 5 Moo. & P. 768.

Leighton v. *Wales.*

In *Leighton* v. *Wales*, 3 M. & W. 545, the plaintiff and defendant agreed to become partners, for the purpose of running a coach daily at certain hours between London and Croydon, with various stipulations; and among them a power to either party to determine the partnership by giving a month's notice, and an agreement that on such dissolution, and so long as the plaintiff should carry on the trade of a coach-proprietor at Croydon, the defendant should not be concerned in running any coach on the road within certain hours in the day, "under the *penalty* of 40*l.*, to be recovered by the plaintiff as liquidated damages;" and by the last article, the parties without prejudice to the preceding article bound themselves for the purpose of the agreement in every respect, "under the penalty of 100*l.*, to be recovered as aforesaid." It was held that the 40*l.* was not to be considered as a penalty. See *Crisdee* v. *Bolton*, 3 Car. & P. 240

Waiver of damages.

An agreement made without consideration to waive the payment of liquidated damages is void: *Denton* v. *Richmond*, 1 Cr. & M. 742.

The condition of a bond being larger than the recital, the recital shall restrain it.

Construction of Condition.]—The condition of a bond being larger than the recital, the recital shall restrain it: *Parker* v. *Wise*, 6 Mau. & S. 239 (*a*). Thus, where in the condition of a bond it was recited, that a sheriff had appointed the defendant bailiff of a hundred within his county, "If there-

(*a*) A recital in a bond will bind the obligor by estoppel: 1 Wms. Saund. 215, n. 2; *Hill* v. *Manchester Water Works Co.*, 2 B. & Ad. 545; *Lainson* v. *Tremere*, 3 Nev. & M. 603. The obligee, being no party to the bond, is not estopped; but a surety by bond is estopped by a recital of title in the principal, being presumed to have executed with a knowledge of the facts: *Edwards* v. *Brown*, 3 Y. & J. 423.

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fore the defendant shall duly execute all warrants to him directed, that then," &c.; it was adjudged, that the words "all warrants" should be intended to be only all warrants which were directed to the defendant *as bailiff of the said hundred*, and not other warrants. *Horton* v. *Day*, cit. 2 Saun. 414. So, where, in debt on bond, against a surety, the condition was in these words: "The condition of this obligation is such, that whereas the above-named Henry Lord Arlington, postmaster-general to the King's most excellent Majesty, by his sufficient instrument or writing, under his hand and seal, bearing date the 30th day of April, 1667, hath deputed the above-bound Thomas Jenkins to be his deputy-postmaster of the stage of Oxon, in the county of Oxon, above said, to execute the said office from the 24th day of June next coming *for the term of six months following;* Now, if the said Thomas Jenkins, his deputies, servants, and assigns, do and shall, for and during *all the time* that he the said Thomas Jenkins shall continue deputy-postmaster of the said stage, well, truly," &c.: It was held, that the condition referred to the recital only, by which the defendant was bound only for six months, and not longer; for the words, "during all the time," shall be intended but only during the six months recited in the condition: *Lord Arlington* v. *Merricke*, 2 Saun. 411.

The last-cited case has been considered as a leading authority upon this subject ever since. So, where the condition of a bond, reciting that the defendant had agreed with the plaintiffs to collect their revenues from time to time for twelve months, was, that at all times thereafter during the continuance of such his employment, and for so long as he should continue to be employed, he would justly account and obey orders, &c.; it was held, that the obligation was confined to the period of twelve months mentioned in the recital; and *Lord Arlington* v. *Merricke* was relied upon and recognised as a case expressly in point: *Liverpool Waterworks Company* v. *Atkinson*, 6 East, 507. So the extent of the condition of an indemnity bond may be restrained by the recitals, though the words of the condition import a larger liability than the recitals contemplate: *Pear-*

sall v. *Summersett*, 4 Taun. 593. See also *Strange* v. *Lee*, 3 East, 484; *Weston* v. *Burton*, 4 Taun. 673; *Simpson* v. *Cooke*, 8 Moo. 588. Where, in debt on bond, conditioned that one W. B. should, during the time he should continue in the service of the plaintiff as a 'broad-clerk, keep just and true accounts of all monies received and paid, and from time to time pay all monies which he should receive belonging to the plaintiff into his hands; the breach assigned was that W. B. received 147*l.* 13*s.* on account of the plaintiff and his partner, which sum he had not paid: but, on demurrer, the Court, on the authority of *Lord Arlington* v. *Merricke*, and of *Horton* v. *Day*, held, that the defendant, who was a surety only, ought not to be bound beyond the scope of his engagement, which was to be answerable for the fidelity of the said W. B. to the plaintiff only; and, therefore, when he took in a partner there was an end of the obligation: *Wright* v. *Russell*, 2 W. Bl. 934. See also *Barker* v. *Parker*, 1 T. R. 287; *Bellairs* v. *Ebsworth*, 3 Camp. 53; *Napier* v. *Bruce*, 8 Cl. & F. 470; *Montefiore* v. *Lloyd*, 10 C. B. N. S. 203. But where the security is given to the house, as a banking house for instance, for the fidelity of a clerk, in the counting house, and not to particular persons, a change of partners is held to make no difference, but the surety still continues liable: *Barclay* v. *Lucas*, 3 Doug. 321. So in *Metcalfe* v. *Bruin*, 12 East, 400, it was held that a bond to the trustees of a public unincorporated insurance company, conditioned for the fidelity of a clerk while in the service of the said company, remained in force notwithstanding changes among the individual members of which it was composed. But in *Dance* v. *Girdler*, 1 Bos. & P. 34, it was held that a bond to the governors of a society unincorporated ceased after their incorporation. So, too, it was decided in the case of *University of Cambridge* v. *Baldwin*, 5 M. & W. 580, that a security to answer for several partners, or the survivors of them, does not apply where one retires.

Extent of Condition.

The result of the decided cases is that unless there is a clearly-expressed intention that the

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surety shall be liable, notwithstanding changes in the firm, the contract must be deemed to be, not with the firm, but with the individual members of it: Lindley on Partnership, 212.

This doctrine has now received legislative confirmation by the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, which enacts:

Guarantee to or for a firm not to be binding after a change in the firm, unless a contrary intention appears by express stipulation or necessary implication.

Sect. 4. "No promise to answer for the debt, default, or miscarriage of another made to a firm consisting of two or more persons, or to a single person trading under the name of a firm, and no promise to answer for the debt, default, or miscarriage of a firm, consisting of two or more persons, or of a single person trading under the name of a firm, shall be binding on the person making such promise in respect of anything done or omitted to be done after a change shall have taken place in any one or more of the persons constituting the firm, or in the person trading under the name of a firm, unless the intention of the parties, that such promise shall continue to be binding, notwithstanding such change, shall appear either by express stipulation, or by necessary implication from the nature of the firm or otherwise."

The condition may be extended to advances by future partners.

But a bond may be drawn with a condition for the obligor to be answerable not only to the present, but to all future partners in the house: *Strange* v. *Lee*, 3 East, 491; *Pease* v. *Hirst*, 10 B. & C. 122; *Toulmin* v. *Copland*, 3 Y. & C. Ex. 625; *Batson* v. *Spearman*, 9 A. & E. 298.

Bond by a surety for advances to a definite amount when a continuing guarantee.

Continuing guarantees.]—If a bond be given, or other instrument *under seal* be entered into by a surety as an indemnity for advances to a definite amount, when advances are made to that amount, the guarantee becomes *functus officio*, and is not a continuing guarantee: *Kirby* v. *Duke of Marlborough*, 2 Man. & S. 18. See *Williams* v. *Rawlinson*, 10 Moo. 362. But where a warrant of attorney was given with the following defeasance: "The within warrant of attorney is given to secure the sum of 4,000*l.*, with lawful interest thereon," it was held that it was to be construed as a continuing security, and not merely as applicable to the debt existing at the time, and therefore was not satisfied by the payment of a larger sum by the debtor, on a general account: *Woolley* v. *Jennings*, 5 B. & C. 165.

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Doctrine as to continuance of guarantees.

The greater number of the cases upon this question as to the extent of a guarantee, have arisen upon unsealed mercantile guarantees, and are by no means consistent with each other, in consequence, chiefly, of the different principles of decision which have been adopted at different times; it having been held, in some cases, that the instrument should be construed liberally in favour of the person taking the guarantee; *Mason* v. *Pritchard*, 12 East, 227; 2 Camp. 436; in others, that it should be construed in favour of the person giving it: *Nicholson* v. *Paget*, 1 Cr. & M. 68. See *Mayer* v. *Isaac*, 6 M. & W. 605. Thus, a guarantee for any debt B. may contract with C., not exceeding 100*l.*, has been held to continue after payments by B. to C. to that amount; *Merle* v. *Wells*, 2 Camp. 413. See also *Wood* v. *Priestner*, L. R. 2 Ex. 282; although a very similar condition in an instrument under seal, in the case of *Kirby* v. *Duke of Marlborough*, 2 Mau. & S. 18, was held, as we have seen, not to continue; as, in the case of *Bovill* v. *Turner*, 2 Chitt. 205, which was a guarantee for the payment of coals to the amount of 50*l.*, "for which the defendant would be answerable at any time." See, in addition to the cases cited above, *Bastow* v. *Bennett*, 3 Camp. 220; *Melville* v. *Hayden*, 3 B. & Al. 593; *Simpson* v. *Manley*, 2 Cr. & J. 13; *Allen* v. *Kenning*, 2 Moo. & Sc. 769; *Batson* v. *Spearman*, 9 A. & E. 298; *Heffield* v. *Meadows*, L. R. 4 C. P. 595; *Lawrie* v. *Scholfield*, L. R. 4 C. P. 622; *Coles* v. *Park*, L. R. 5 C. P. 65; *Nottingham Hide, &c. Market Co.* v. *Bottril*, L. R. 8 C. P. 694. The leaning of the Courts in modern times appears to be against limiting the liability of the surety, except in cases where the suretyship is created by an instrument under seal.

Right to determine a continuing guarantee.

The reason for this seems to be that if a guarantee be under seal, and give no power to the surety to put an end to his liability, the surety cannot do so by giving notice;—*aliter*, if the instrument is not under seal: see *Hassell* v. *Long*, 2 Mau. & S. 370; *Gordon* v. *Calvert*, 2 Sim. 253; *Hough* v. *Warr*, 1 Car. & P. 150.

Effect of acquiescence of surety.

If the surety in a bond concurs in an arrangement on the settlement of accounts between the creditor

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and the principal, by which a security, to which he is a party, is considered as remaining unsatisfied (certain sums paid by the principal being applied in satisfaction of another debt), he cannot afterwards claim to have those monies applied in liquidation of the debt secured by him; and it should seem that his acquiescence would be presumed, if he can be proved to have known of such an arrangement without protesting against it: *Tyson* v. *Cox*, Turn. & R. 395; *Williams* v. *Rawlinson*, 10 Moo. 362.

Ingleby v. *Mousley*. Recital of agreement to give bond in a less penalty than that contained in the bond, held not to limit the remedy on the bond.

Where the penalty of a bond, given by a principal and two sureties, was 1,000*l.*, and the condition recited that the principal had taken a lease from the obligee, and that it had been agreed between the principal and the obligee, that the former should enter into a bond with two sufficient sureties, in the penalty of 500*l.*, for the payment of the rent, &c., and then proceeded to declare the condition accordingly; it was held, that the recital did not control the bond so as to prevent the obligee from recovering upon it a greater sum than 500*l.* for rent in arrear: *Ingleby* v. *Mousley*, 3 Moo. & Sc. 488. In *Sanson* v. *Bell*, 2 Camp. 39, where the recital stated an agreement that the sureties should be liable for certain matters, and the condition extended to other matters, it was held that the latter was not restrained by the former.

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When the performance of the condition of a bond becomes impossible by the act of the obligor, or of any other person than the obligee, such impossibility forms no answer to an action on the bond: Br. Ab. *Condition*, pl. 127; Com. Dig. *Condition* (L. 7), (M. 3); Bac. Ab. *Oblig.* (E.). See *Pullerton* v. *Agnew*, 1 Salk. 172; *Tuffnell* v. *Constable*, 3 Nev. & P. 47. But where, upon the marriage of A. with B., the widow of C. and his successor in trade, A., in consideration of the stock-in-trade which he received from B., gave a bond to a trustee conditioned to pay to B.'s children, within a year after her death, 300*l.*, if upon account taking the stock-in-trade and effects of the business, if then carried on by A., should amount to 400*l.*; but, in case upon such account the stock-in-trade should amount to less than 400*l.*, then to pay to the children 120*l.*: it was held, that the bond

was discharged on A.'s discontinuing the business in B.'s lifetime: *Beswick* v. *Swindells*, 5 Nev. & M. 378. Illegal Contracts.

2. Illegal Conditions and Contracts.

Bonds with conditions expressly against the law are void; and the illegality may be pleaded in defence to an action; Noy's Maxims, 78; 2 Wils. 347; and there is no estoppel in such cases; *Paxton* v. *Popham*, 9 East, 421; *Gas Light and Coke Co.* v. *Turner*, 7 Scott, 779; 8 Scott, 609; *Rex* v. *North Wingfield*, 1 B. & Ad. 912; *Duvergier* v. *Fellowes*, 2 Moo. & P. 384; and an unstamped writing is admissible in evidence; *Coppock* v. *Bower*, 4 M. & W. 361; for transactions which have for their object the encouragement of manifest crimes, can never receive the sanction of a court of judicature; and any engagement for a reward to abstain from such crimes, is equally discountenanced, as it might lead to criminality or extortion: Shep. Touch. 132; *Amicable Society* v. *Bolland*, 4 Bli. N. S. 194. So, every transaction, the object of which is the violation of a public or private duty, is also void: such are bribes for appointing to offices of trust; private engagements that an office shall be held in trust for a person by whose interest it was procured; agreements to stifle a prosecution for any crime of a public nature: see *Parsons* v. *Thompson*, 1 H. Bl. 322; *Garforth* v. *Fearon*, 1 H. Bl. 327; *Blachford* v. *Preston*, 8 T. R. 89; *Collins* v. *Blantern*, 2 Wils. 347; *Johnson* v. *Ogilby*, 3 P. Wms. 279; *Prole* v. *Wiggins*, 3 Scott, 607; *Garth* v. *Earnshaw*, 3 Y. & C. Ex. 584; 1 Fonbl. Eq. 255, 5th Ed.; 2 Evan's Pothier on Contracts, 2. Although a contract is not prohibited by any positive law (*a*), nor adjudged illegal by any

Bonds with conditions against the law are void.

Transactions the object of which is the violation of a public or private duty, void.

(*a*) What is done in contravention of an Act of Parliament cannot be made the subject-matter of an action: *Langton* v. *Hughes*, 1 Mau. & S. 596; *Ewing* v. *Osbaldiston*, 2 My. & Cr. 53. Thus, where the stat. 25 Geo. 2, c. 77, enacted, that it should not be lawful to distil or boil any tar, &c., in certain situations; it was held that an action of covenant for rent could not be supported upon a demise of premises, for the purpose of being used for such unlawful purpose: *Gas Light Co.* v. *Turner*, 7 Scott, 779; 8 Scott, 609. And it made no difference that the illegal act had not in fact been committed: Ib., 2 Per. & D. 721. So also an

Illegal Contracts.

precedents, yet it may be decided to be so upon principles: per Lord *Mansfield*, *Jones* v. *Randall*, Cowp. 39. So where the defendant to an action for breach of contract had contracted to let rooms to the plaintiff, but afterwards discovering that they were intended to be used for the delivery of lectures of a blasphemous character, refused to allow the use of them, it was held that the intended purpose was illegal and that the contract could not be enforced by law: *Cowan* v. *Milbourn*, L. R., 2 Ex. 230. An agreement that an obligee should not sue on a bond in consideration that his adulterous conduct should not be exposed by the obligor, was held to be without consideration and void accordingly: *Brown* v. *Brine*, 1 Ex. D. 5.

Instances of conditions against law.

All the instances of conditions against law, in a proper sense, are reducible under one of these heads:

1st. Either to do something which is *malum in se*, or *malum prohibitum:* Co. Lit. 206 b; *Wallis* v. *Day*, 2 M. & W. 276; *Hanington* v. *Du Chastel*, 2 Swanst. 161, n.

2ndly. To omit the doing of something which is a duty: Palm. 172; Hob. 12.

3rdly. To encourage such crimes and omissions: Fitz. *Obligation*, 13; Bro. *Obligation*, 34; Dyer, 118.

Such conditions as these the law will always and without any regard to circumstances defeat; being concerned to remove all temptations and inducements to those crimes; and, therefore, as in Noy, and in Co. Lit. 206, a feoffment shall be absolute for

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agreement between the parties to a suit to waive an objection for want of a stamp, will not be sanctioned by the Court; and if such an agreement come to its knowledge, the decree will not be made until the instrument is produced, duly stamped, to the registrar: *Owen* v. *Thomas*, 3 M. & K. 353; 2 Esp. 724. But see as to objection for want of stamp, *Doe* v. *Smith*, 3 Nev. & P. 365. A bond of indemnity against a breach of trust is not illegal: *Warwick* v. *Richardson*, 10 M. & W. 284.

Foreign contracts.

As a general rule a contract will not be enforced unless it is valid according to the law of the country in which it was made (*lex loci contractûs*) as well as according to the law of the country where its enforcement is sought (*lex fori*): *Hope* v. *Hope*, 8 De G., M. & G. 731. See also *Rousillon* v. *Rousillon*, 14 Ch. D. 351.

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an unlawful condition subsequent, and a bond void. But where there may be a way discovered to perform the condition, without a breach of the law, it shall be good: Hob. 12; Perk. s. 228; *Mitchel* v. *Reynolds*, 1 P. Wms. 189, where the subject is treated in a masterly manner. See also Com. Dig. *Chancery* (4 D. 5).

A bond may be good in part and bad in part.

Where the condition of a bond is entire, and the whole is against law, it is void; but where the condition consists of several different parts, and some of them are lawful, and the others not, it is good for so much as is lawful, and void for the rest: *Lee* v. *Coleshill*, Cro. Eliz. 529; *Chesman* v. *Nainby*, 2 Ld. Raym. 1459; 2 Stra. 744; *Twyne's Case*, 3 Co. 83 a; *Newman* v. *Newman*, 4 Mau. & S. 66; *Biddell* v. *Leader*, 1 B. & C. 327; *Wallis* v. *Day*, 2 M. & W. 273. Thus, where a deed limits real property to uses, some of which are charitable uses within the stat. 9 Geo. 2, c. 36, the deed will be void so far as such charitable uses are concerned, but may be upheld as regards other limitations therein contained: *Howe* v. *Lynge*, 15 East, 440. So, the Court will enforce proper covenants in a separation deed, though it may contain other covenants which are illegal: *Hamilton* v. *Heaton*, L. R., 13 Eq. 511. See further as to this question, *Newman* v. *Newman*, 4 Mau. & S. 68; *Gaskell* v. *King*, 11 East, 165; *Wigg* v. *Shuttleworth*, 13 East, 87; *Biddell* v. *Leader*, 1 B. & C. 327. Where a contract rests upon two considerations, and one of them is on the face of it impossible or unintelligible and imperfect, the impossible or absurb part may be rejected, and the promise may be referred to the other part; but not if part of the consideration is illegal: *Featherstone* v. *Hutchinson*, Cro. Eliz. 199; *M'Allen* v. *Churchill*, 11 Moo. 483; *Waite* v. *Jones*, 1 Scott, 730; *Shackell* v. *Rosier*, 3 Scott, 74. The distinction in this respect between a consideration and a condition or promise is obvious. If the act which is agreed to be done may, according to the circumstances, be lawful or unlawful, it will be presumed that the contract was to do the lawful act: *Lewis* v. *Davison*, 4 M. & W. 654; *Stevens* v. *Webb*, 7 Car. & P. 60.

Those bonds which chiefly deserve consideration,

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on the ground of unlawfulness, are such as relate to,—

Bonds of resignation.

1. *Bonds of Resignation.*]—Simony was not an offence punishable in a criminal way at the common law: Cro. Car. 361. The ecclesiastical law deprived the incumbent of the living; but it could not affect the temporal rights of any person, or subject him to any forfeiture or penalty, for making a simoniacal contract. However, it was at length prohibited, under very severe penalties, by the following Act:

Stat. 31 Eliz. c. 6, A.D. 1589.

31 Eliz. c. 6, intituled, "An Act against abuses in election of scholars, and presentation to benefices," which enacts,—

The penalty for simoniacally presenting to a benefice, or for being presented for reward.

Sect. 5. "That, if any person or persons, bodies politic and corporate, shall or do at any time after the end of forty days next after the end of this session of Parliament, for any sum of money, reward, gift, profit, or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance, of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly, present, or collate any person to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, or give or bestow the same for or in respect of any such corrupt cause or consideration, that then every such presentation, collation, gift, and bestowing, and every admission, institution, investiture, and induction thereupon, shall be utterly void, frustrate, and of none effect in law: And that it shall and may be lawful to and for the Queen's majesty, her heirs and successors, to present, collate unto, or give or bestow every such benefice, dignity, prebend, and living ecclesiastical, for that one time or turn only, and that all and every person or persons, bodies politic and corporate, that from thenceforth shall give or take any such sum of money, reward, gift, or benefit, directly or indirectly, or that shall take or make any such promise, grant, bond, covenant, or other assurance, shall forfeit and lose the double value of one year's profit of every such benefice, dignity, prebend, and living ecclesiastical; and the person so corruptly taking, procuring, seeking, or accepting any such benefice, dignity, prebend, or living, shall thereupon and from thenceforth be adjudged a disabled person in law, to have or enjoy the same benefice, dignity, prebend, or living ecclesiastical."

Anciently the statute did not make the bond void, but only the presentment.

Lord *Coke* says, "*Nota*, the statute doth not make the bond, promise, covenant, or other assurance void, but the presentment, &c., and so it was adjudged, Pasch. 40 Eliz. Rot. 1745, in *commun*

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banco, between *Gregory*, plaintiff, and *Oldbury*, defendant. *Nota differentiam inter malum in se*, against the common law, *et malum prohibitum*, by statute law; *et malum in se* against the common law, and *malum prohibitum* by the civil or canon law, whereof the judges of the common law, in these cases, take no notice": 3 Inst. 153. Therefore, if the incumbent did not resign on request, he was subject to the whole penalty of the bond: Degge's Parson's Counsellor, 55, 6th ed.

What is simony?

What is or is not simony now depends on the statute 31 Eliz. c. 6, which has defined it to be a corrupt agreement to present: Per *De Grey*, C. J., *Barratt* v. *Glubb*, 2 W. Bl. 1052; Cunningham on Simony, 2, 97.

Bonds of resignation, special or general.

A bond of resignation is a bond given by the person presented, or intended to be presented, to a benefice, with a condition to resign the same: and is special, or general. The condition of a special bond is, to resign the benefice in favour of some certain person, as a son, kinsman, or friend of the patron, when he shall be capable of taking the same. By a general bond, the incumbent is bound to resign on request.

Invalidity of general bonds of resignation.

Formerly, general as well as special bonds of resignation, whether given before or after the presentation, were held good at law, and Chancery only interfered when an improper use was attempted to be made of them. But in the case of the *Bishop of London* v. *Ffytche*, 1 East, 487; 3 Doug. 142, the House of Lords held, that a presentation after a general bond of resignation, is illegal: the bond being a benefit to the patron, within the 31 Eliz. c. 6; and the giving it being the price of his presentation; and it being given for the purpose of obtaining the presentation. And, therefore, the House held, that the bishop could not be compelled to induct the parson presented. The validity of the bond was not in issue. However, subsequently to that case, the prevailing opinion of the profession has been, that no general bond of resignation could be supported; and writers have even gone so far as to say, that the House adjudged that a general bond of resignation was void. See Leach's

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Note, 12 Mod. 505 (*b*); 6 Bac. Abr. Gwill. Ed. 192; 1 Id. 644 (K); 1 Fonbl. T. 232, (*b*); Christian's note, 2 Bl. Com. 280, (8); 6 Supp. Vin. Abr. 173, pl. 2; Ellis on Debtor and Creditor, 119; and the subsequent cases concerning bonds of resignation. Dr. Wooddeson, with his usual discrimination, classes it with the causes for which a bishop may legally reject a clergyman presented to him for institution: 1 Wooddes. Lect. 323. The invalidity of a bond for resignation in favour of a designated individual (with respect to which alone any doubt has been entertained in modern times), was finally established by the House of Lords, in the case of *Fletcher* v. *Lord Sondes*, 5 B. & Al. 835; 3 Bing. 501; and 1 Bligh, N. S. 144. As the effect of this decision would have been to expose to penalties numerous persons who had been parties to such transactions, in ignorance of the existing law, as well as to invalidate all antecedent engagements of this nature, the interposition of the legislature became necessary, and accordingly the statute 7 & 8 Geo. 4, c. 25, was passed, which has been since repealed.

This Act had only an *ex post facto* operation, and left the law respecting future bonds of resignation untouched; but an Act was soon afterwards passed to deal with this subject.

Stat. 9 Geo. 4, c. 94.

The statute 9 Geo. 4, c. 94, intituled "An Act for rendering valid Bonds, Covenants, and other Assurances for the resignation of Ecclesiastical Preferments, in certain specified Cases," after reciting that it is expedient that certain bonds, &c. for resignation of ecclesiastical preferments should be valid, enacts,—

Engagements entered into for the resignation of any benefice, in favour of one or one of two specified persons to be valid.

"That every engagement by promise, grant, agreement, or covenant, which shall be really and *bonâ fide* made, given, or entered into, at any time after the passing of this Act for the resignation of any spiritual office, being a benefice with cure of souls, dignity, prebend, or living ecclesiastical, to the intent or purpose to be manifested by the terms of such engagement, that any one person whosoever, to be specially named and described therein, or one or two persons to be specially named and described therein, being such persons as are hereinafter mentioned, shall be presented, collated, nominated, or appointed to such spiritual office, or that the same shall be given or bestowed, to or upon him, shall be good, valid, and effectual in the law, to all intents

and purposes whatsoever, and the performance of the same may also be enforced in equity. Provided always, that such engagement shall be so entered into before the presentation, nomination, collation, or appointment of the party so entering into the same as aforesaid. Illegal Contracts.

Sect. 2. "That where two persons shall be so specially named and described in such engagement, each of them shall be, either by blood or marriage, an uncle, son, grandson, brother, nephew, or grandnephew of the patron, or of one of the patrons of such spiritual office, not being merely a trustee or trustees, of the patronage of the same, or of the person or one of the persons from whom the patron or patrons shall be a trustee or trustees, or of the person or of one of the persons, by whose direction such presentation, collation, gift, or bestowing shall be intended to be made, or of any married woman whose husband in her right shall be the patron or one of the patrons of such spiritual office, or of any other person in whose right such presentation, &c. shall be intended to be made. Where two persons are specified they must be relations of the patron.

Sect. 3. "That no presentation, collation, gift, or bestowing, to or of any such spiritual office of or upon any spiritual person, to be made after the passing of this Act, nor any admission, institution, investiture, or induction thereupon, shall be void, frustrate, or of no effect in law, for or by reason of any such engagement so to be made, given, or entered into, by such spiritual person, or any other person or persons, to or with the patron or patrons of such spiritual office, or to or with any other person or persons for the resignation of the same, as aforesaid; and that it shall not be lawful for the king's most excellent majesty, his heirs, or successors, for, or by reason of, any such engagements as aforesaid, to present, or collate unto, or give, or bestow, such spiritual office; and that such spiritual person and patron or patrons, or other person or persons respectively, shall not be liable to any pains, penalty, forfeitures, loss, or disability, nor to any prosecution or other proceeding, civil, criminal, or penal, in any court, ecclesiastical or temporal, for or by reason of his, her, or their having made, given, or entered into or accepted, or taken such engagement as aforesaid: And that every such presentation, or collation, or gift, or bestowing, to be made after the passing of this Act, and every admission, institution, investiture, and induction thereupon, shall be as valid and effectual in the law, to all intents and purposes whatsoever, as if such engagement had not been made, given, or entered into, or accepted, or taken: any thing in an Act passed in the 31st year of the reign of her late Majesty Queen Elizabeth, intituled, 'An Act against Abuses in Elections of Scholars and Presentations to Benefices,' No presentation to any spiritual office shall be void by reason of such agreement to resign. Persons making such agreement not to be liable to penalty. Presentations on such conditions to be valid, notwithstanding 31 Eliz. c. 6.

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or in any other Act, statute, or canon, or any law to the contrary in anywise notwithstanding.

This Act not to extend to any engagement unless the deed be deposited, within two months, with the registrar of the diocese or peculiar jurisdiction, wherein the benefice is situated.

Sect. 4. "That nothing in this Act shall extend to the case of any such engagement as aforesaid, unless one part of the deed, instrument, or writing by which such engagement shall be made, given or entered into, shall, within the space of two calendar months next after the date thereof, be deposited in the office of the registrar of the diocese wherein the benefice, with cure of souls, dignity, prebend, or living ecclesiastical, for the resignation whereof such engagement shall be made, given, or entered into, as aforesaid, shall be locally situate, except as to such benefices, with cure of souls, dignities, prebends, or livings ecclesiastical, as are under the peculiar jurisdiction of any archbishop or bishop; in which case, such document as aforesaid shall be deposited in the office of the registrar of that peculiar jurisdiction to which any such benefice, with cure of souls, dignity, prebend, or living ecclesiastical, shall be subject; and such registrars shall respectively deposit and preserve the same, and shall give and sign a certificate of such deposit thereof. And every such deed, instrument or writing, shall be produced at all proper and usual hours, at such registry, to every person applying to inspect the same. And an office copy of each such deed, instrument or writing, certified under the hand of the registrar (and which office copy, so certified, the registrar shall, in all cases, grant to every person who shall apply for the same) shall, in all cases, be admitted and allowed as legal evidence thereof in all Courts whatsoever: And every such registrar shall be entitled to the sum of two shillings, and no more, for so depositing, as aforesaid, such deed, instrument or writing, and so, as aforesaid, certifying such deposit thereof, and the sum of one shilling and no more, for each search to be made for the same, and the sum of sixpence, and no more, over and besides the stamp duty, if any, for each folio of seventy-two words of each such office copy so certified as aforesaid.

Deed to be open to inspection, and a certified copy to be admitted as evidence.

Fees to registrar.

Resignation in pursuance of an engagement to state the engagement and the name of person for whom made.

Ordinary not to refuse resignation without sufficient cause.

Sect. 5. "That every resignation to be made in pursuance of any such engagement as aforesaid, shall refer to the engagement in pursuance of which it is made, and state the name of the person for whose benefit it is made; And that it shall not be lawful for the ordinary to refuse such resignation, unless upon good and sufficient cause to be shown for that purpose, and that such resignation shall not be valid or effectual except for the purpose of allowing the person for whose benefit it shall be so made, to be presented, collated, nominated, or appointed to the spiritual office thereby resigned, and shall be absolutely null and void unless such person shall be presented, collated, nomi-

nated, or appointed as aforesaid, within six calendar months next after notice of such resignation shall have been given to the patron or patrons of such spiritual office.

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Resignation to be void unless the person be presented within six months.

Sect. 6. "That nothing in this Act shall extend to any case where the presentation, collation, gift, or bestowing, to or of any such spiritual office as aforesaid, shall be made by the king's most excellent majesty, his heirs or successors, in right of his Crown, or of his Duchy of Lancaster, or by any archbishop, bishop, or other ecclesiastical person, in right of his archbishoprick, bishoprick, or other ecclesiastical living, office or dignity, or by any other body politic or corporate, whether aggregate or sole, or by any other person or persons in right of any office or dignity, or by any company, or any feoffees or trustees for charitable or other public purposes, or by any other person or persons not entitled to the patronage of such spiritual office as private property."

Nothing herein to extend to presentations made by the Crown, corporations, trustees, &c.

General bond of resignation by master of public school.

In *Legh* v. *Lewis*, 1 East, 391, it was held, that a bond given by a schoolmaster of an ancient public school, who had a freehold in his office, to resign at the request of his patron, is good at law; but equity will restrain any improper use of it by the patron. Lord *Kenyon* said, "I cannot see anything illegal or wrong in the patron of this school taking a general bond of resignation from the schoolmaster whom he appoints. Many good reasons may occur for taking such a security; it enforces his good behaviour, and may tend to prevent those ill consequences which too frequently happen from the neglect of those whose duty it is to superintend such institutions."

Condition bad in part may be good as to other parts.

In an action on a bond conditioned for the performance of several things, if one of them be void, yet the bond may be good for the others. Thus, in *Newman* v. *Newman*, 4 Mau. & S. 66, the bond was conditioned to pay money to the obligee upon the conveyance of an estate to the obligor, and to present the obligee's son to the next avoidance of a church, the advowson of which belonged to the estate, if he were then of age to take it; or if not, to procure the person who should be presented, to resign upon notice of the son's being qualified to take it, and to present him; the Court held that the bond was good for the payment of the money. Lord *Ellenborough* said, "Admitting the condition of this

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bond to be ill as to one part of it, it seems that it may be well as to the other parts; for you may separate at the common law the bad from the good. Supposing, therefore, we held it to be simoniacal so far as it regards the presentation of the son of the obligee, yet for the payment of the two sums (mentioned in the condition) it is exempt from all vice. Therefore, that objection would not be a bar to this action."

In *Ex parte Rainier*, 1 Jac. & W. 280, a bond for the performance of a covenant to pay an annuity, until a person should be in the enjoyment of a benefice which he might hold during his life, of the yearly value of 600*l.*, was held to be satisfied by his induction to a living of that value, accompanied by a bond to resign in favour of either of two sons of the patron, when qualified to take it; but liberty was given to take the opinion of a court of law. On the part of the parson, it was contended, that, having been presented on an undertaking to resign, and a bond being given to that effect, it was a benefice that could not have been retained for life. But Lord Chancellor *Eldon* said, "still he might have held it for life; he might, if he chose, have kept the living and forfeited the bond."

Bishop may refuse to accept resignation.

It seems to be clear that the bishop may refuse to accept a resignation, upon a sufficient cause for his refusal; but whether he can merely at his will and pleasure refuse to accept a resignation without any cause, and who shall finally judge of the sufficiency of the cause, and by what mode he may be compelled to accept, are questions involved in doubt. See 1 Bl. Com. 393 (39): *Newdigate* v. *Helps*, 6 Madd. 133. But a parson bound in a bond to resign a living, must procure the bishop's acceptance at all events: *Hesketh* v. *Grey*, 2 Phill. Eccl. Law, 1119.

Tenant cannot impute simony to his landlord.

In an action by an incumbent for use and occupation, the rule that the tenant shall not dispute his landlord's title, extends to estop the defendant from giving evidence of a simoniacal presentation of the plaintiff: *Cooke* v. *Loxley*, 5 T. R. 4. So, where an action was brought by an incumbent on an agree-

ment with the occupier of lands for a composition for tithes. The true distinction is between the parson claiming the thing itself through his title of rector or vicar, and claiming a sum of money on a contract between himself and the occupier of the land: *Brooksby* v. *Watts*, 6 Taun. 333. See *Wood* v. *Strickland*, 2 Ves. & B. 150. Illegal Contracts.

See further, on bonds of resignation and simony, Watson's Clergyman's Law, 36, 37, 4th ed.; Gibson's Codex Juris Ecclesiastici Anglicani, 799, 800, 2nd ed.; Degge's Parson's Counsellor, 51, 6th ed.; 3 Burn's Eccles. Law, 354, 6th ed.; 6 Bac. Ab. 192, *Simony* (B), &c.; 1 Id. 644, *Conditions* (K); 1 Fonbl. Treat. Equity, 232; Com. Dig. *Esglise* (N. 3), *ad finem*, 2 Phill. Eccl. Law, 1118—1127, and *ante*, Vol. 1, p. 468 *et seq.*

2. *Marriage Brocage Bonds.*]—These bonds are void as introductive of mischief. However, equity does not interpose on account of any particular injury done to the party, who is *particeps criminis*, and not entitled to relief, but on public considerations, that marriage, as it greatly concerns the public good, may be on a proper foundation; *Debenham* v. *Ox*, 1 Ves. sen. 277; and, therefore, such a bond is in no case to be countenanced. Thus, where the plaintiff gave a bond to the defendant, conditioned in effect, that if the plaintiff married J. S., then the plaintiff to pay a certain sum of money; the defendant procured the marriage, and put the bond in suit; but it was decreed to be delivered up, the young gentlewoman having 2,000*l.* portion, and the man being sixty years of age, and having seven children: *Drury* v. *Hooke*, 1 Vern. 412; 2 Ch. Ca. 176. See also *Hall* v. *Potter*, Show. P. C. 76; *Smith* v. *Aykwell*, 3 Atk. 566. So, a bond to *give* money, if such a marriage could be obtained, is ill; and, by the same reason, a bond to *forgive* a sum of money, in the same event, must be ill also: *Hamilton* v. *Mohun*, 1 P. Wms. 120. So, wherever a mother, or father, or guardian insist upon a private gain, or security for obtaining or consenting to a marriage, and obtains it of the Marriage brocage bonds void.

If a parent or guardian obtain a private gain, for procuring or consenting to a marriage, it will be set aside.

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intended husband, it will be set aside: *Keat* v. *Allen*, 2 Vern. 588; *Anon.*, Pr. Ch. 267; *Cole* v. *Gibson*, 1 Ves. sen. 503; Belt's Supp. 211; *Hylton* v. *Hylton*, 2 Ves. sen. 547. The power of a parent or guardian ought not to be used for such purposes, as it would be making a way to enable them to sell infants under their care. And these contracts with the father, mother, or guardian, though of the same nature with brocage bonds, are of more mischievous consequence, because it would happen more frequently. And it is now a settled rule, that, if the father, on the marriage of his son, take a bond of the son, to pay him a sum of money, or make him any recompence, it is void, being procured by coercion while he is under the control of his father: Treat. of Eq. B. 1, ch. iv. s. 10; Fonbl. 5th ed. 260. And as these contracts are avoided on reasons of public inconvenience, they will not admit of subsequent confirmation by the party; *Shirley* v. *Martin*, 1 Fonbl. Treat. of Equity, 264, n. (1); 3 P. Wms. 74; *Cole* v. *Gibbon*, 1 Ves. sen. 506; *Morse* v. *Royal*, 12 Ves. 364, 373; *Crow* v. *Ballard*, 1 Ves. jun. 220; and, consequently, the party entitled to relief cannot release his right to a remedy, and thereby indirectly effect a confirmation, as it would be contrary to the maxims—that which is originally bad cannot be made good; and that which cannot be done directly cannot be done indirectly. And the Court will decree a gratuity actually paid to be refunded: *Goldsmith* v. *Bruning*, 1 Eq. Ca. Abr. 89, pl. 4; *Smith* v. *Bruning*, 2 Vern. 392.

Bond to marry a particular person, or not to marry at all.

3. *In restraint of Marriage and its Rights.*]—It was a rule in the civil law, that marriage ought to be free. The same policy has obtained in equity: and therefore in case of a bond in common form for payment of money, where it was proved that the agreement was, that the obligor should marry such a man, or should pay the money due on the bond, the Court decreed this bond to be delivered up to be cancelled, as being contrary to the nature and design of marriage, which ought to proceed from free choice,

and not from any compulsion: *Key* v. *Bradshaw*, 2 Vern. 102. So, if A., being a widow, gives a bond to B. for 20*l.* if she should marry again, and B. gives a bond to the widow, to pay her executors the like sum if she did not marry again, and the widow soon after marries, her bond will be decreed to be delivered up: *Baker* v. *White*, 2 Vern. 215. See *Woodhouse* v. *Shepley*, 2 Atk. 535; *Lowe* v. *Peers*, 4 Burr. 2225; *Bonfield* v. *Hassall*, 32 L. J., Ch. 475. A wager for fifty guineas that the plaintiff would not marry within six years was held void, although the period of restraint was limited; it not appearing that the restriction was founded on any grounds of prudence: *Hartley* v. *Rice*, 10 East, 22. A restriction against marriage with one specified person is good: *Topham* v. *Duke of Portland*, 32 L. J., Ch. 81. A bond reciting that a marriage agreed upon between the obligor and obligee had been deferred at the request of the former till after her father's death, conditioned that the obligor should not marry any other person than the obligee, and to pay him 1,200*l.* in case she did so, or refused to marry him within a month after her father's death, was held to be good: *Box* v. *Day*, 1 Wils. 59. It seems that a condition not to marry any other person than A. B. is void, unless A. B. is also bound to marry the obligor: *Cock* v. *Richards*, 10 Ves. 429. Where a bequest of an allowance to a feme covert was made on condition that she lived apart from her husband, the condition was held *contrà bonos mores*, and void: *Brown* v. *Peck*, 1 Eden, 140. See *Westmeath* v. *Westmeath*, Jac. 137. But a man is regarded by law as having an interest in his wife's widowhood, and consequently a bequest of an annuity to be paid to her so long as she shall continue his widow is valid: *Lloyd* v. *Lloyd*, 2 Sim., N. S. 255. See *Goodson* v. *Holkham*, Amb. 209. A condition prescribing particular ceremonies or place of marriage is good: *Jervoise* v. *Duke*, 1 Vern. 19; *Randall* v. *Payne*, 1 B. C. C. 55 (*b*).

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Bequest, on condition that a woman lived apart from her husband.

(*b*) So also a testator may impose a reasonable limitation in point of time, *e. g.*, not to marry before attaining twenty-one years of age, provided it be not used as a cover to restrain mar-

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As to separation deeds, *vide infra*, tit. SETTLEMENTS. A limitation of an annuity or life estate during celibacy is good: *Gibson* v. *Dickie*, 3 Mau. & S. 463.

Immoral consideration.

4. *To a kept Mistress.*]—A distinction is made when it appears that these bonds are given as a reward for *past cohabitation*, and when it appears that they are given as an inducement to *future concubinage*.

1st. Past cohabitation with an unmarried man.

Where the man is unmarried, a bond purporting to be *in consideration of cohabitation had* between the obligor and obligee, will generally be held to be good. "The Court may take this for a lawful and conscientious consideration. We must presume that the defendant has done what in honour and conscience he ought to have done; and that he thought himself a wrong-doer, and gave the plaintiff this bond to make her amends": per *Gould*, J., in *Turner* v. *Vaughan*, 2 Wils. 339.

Bond to woman in consideration of past cohabitation.

Formerly, it has been held in a court of equity, that if it were proved the defendant was a common strumpet, the Court would relieve against a bond given to such a woman: *Whaley* v. *Norton*, 1 Vern. 484.

However, the greater liberality of modern judges has softened this severity, on the ground that a provision enables a woman, in such a situation, to lead a course of life more conducive to her happiness and to public morality. A voluntary bond given by a person to a common woman, after he had kept her two years, was not relieved against, upon a bill by the executor of the obligor: *Hill* v. *Spencer*, Ambl. 641. Lord *Camden*, in delivering his judgment, said, "I am clear in my opinion, that the plaintiff is not entitled to relief. The cases which have been determined against securities given to common prostitutes, went upon the circumstances of the securities being given *previous* to the cohabitation; a consideration which, being turpis in its nature, the Court has relieved against them. In this case, the bond was not given for a consideration, but was voluntary. He had resort to her for near two years before he gave her the bond. Past service could not

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riage generally: *Scott* v. *Tyler*, 2 B. C. C. 488; *Yonge* v. *Furse*, 26 L. J., Ch. 352. See further on this point, *post*, tit. WILLS.

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be a consideration at law (*c*), and nothing was stipulated for the future. There is no principle in equity which says, a man may not give a voluntary bond to a common prostitute; it would be going but a little further to say, he could not give her money without her being liable to be called upon for it. There is no circumstance of fraud in this case; and I do not think that, in the case of a voluntary bond, the obligee being a common prostitute is of itself a sufficient ground for relief." And, according to that case, the woman having been criminally connected with another man after she was taken into keeping, does not invalidate the bond. So, where a voluntary bond was given during cohabitation to a woman previously of very loose life, and soon afterwards another bond, expressly securing a continuance of the connexion by an annuity; a bill by the executor to have the bonds delivered up, was dismissed with costs: the former being considered unimpeached, and the latter void at law, as *pro turpi causâ: Gray* v. *Mathias*, 5 Ves. 286. So, a bill brought to be relieved against a bond given to a housekeeper for secret service was dismissed: *Bainham* v. *Manning*, 2 Vern. 242. It was held in the case of *Bennington* v. *Wallis*, 4 B. & Al. 650, that past cohabitation alone, or the ceasing to cohabit in future, is not a good consideration for a promise. But the Court expressed an opinion, that, had it been alleged that the defendant was the seducer, the promise might have been supported. And in *Gibson* v. *Dickie*, 3 Mau. & S. 463, an action of assumpsit was maintained on an agreement by the defendant to allow the plaintiff, with whom he cohabited, an annuity in case they should separate, provided she should continue single.

2nd. Past cohabitation with a married man.

If the consideration be for past cohabitation with a married man, equity will not *assist* the obligee, if she knew the obligor was a married man: *Priest* v. *Parrot*, 2 Ves. 160.

Knye v. *Moore*.

However, where there are children, the modern

(*c*) But see the case of *Bennington* v. *Wallis*, 4 B. & Al. 650, cited *infra*.

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doctrine of the Court is more liberal. Thus, in *Knye* v. *Moore*, 1 Sim. & S. 61, a contract by a married man with a woman with whom he had cohabited, to pay her an annual sum for the maintenance of herself and her children, was held to be valid.

Equity will not relieve obligor on his own application.

So it seems that equity will not, in any case, relieve the obligor on his own application; as where a man had seduced his wife's sister, and had several children by her, and had given her a bond for payment of money as a provision for her and the children; the bond being put in suit against him, he brought a bill, suggesting that the bond was not given for money lent, or any valuable consideration; Lord *Somers* decreed the payment of what was due on the bond for principal and interest, with costs, by a short day, or else the bill to be dismissed with costs; and his lordship said, it was a pity he could do no more: *Spicer* v. *Hayward*, Pr. Ch. 114; 1 Fonbl. 229.

These bonds postponed to claims of creditors,

These bonds being merely voluntary, even though by way of *præmium pudicitiæ*, the payment of them out of the personal estate will be postponed until all the other creditors, whether by bond or simple contract, are paid; but if the personal estate falls short, then they must be paid out of the real estate, if there be any: *Jones* v. *Powell*, 1 Eq. Ab. 84, pl. 2; *Cray* v. *Rooke*, Ca. temp. Tal. 133; *Harris* v. *Annandale*, 2 P. Wms. 432. Thus, where A., having a wife who lived separate from him, afterwards courted and *married* another woman, who knew nothing of the former's wife being alive; but it being discovered to the second wife that the former was alive, A., in order to prevail with the second wife to stay with him, some years afterwards gave a bond to a trustee for the second wife, to leave her 1,000*l.* at his death, and died, not leaving assets to pay his simple contract debts; Sir *Joseph Jekyll* held that if this bond had been given immediately on the discovery, and they had parted thereupon, it had been good; but being given in trust for the second wife, after such time as she knew the first wife was living, and to induce her to continue with A., this was worse than a voluntary bond, and decreed to be postponed to all the simple contract debts: *Lady Cox's case*, 3 P.

Wms. 339; 2 Eq. Ab. 182, pl. 6, 258, pl. 13. See also *Robinson* v. *Gee*, 1 Ves. 254. But a bond of this kind must be paid before legacies; for although voluntary, yet it transfers a right in the life of the obligor, and legacies arise only from the will, which takes effect only from the testator's death, and therefore ought to be postponed to a right created in the testator's lifetime: *Fairebeard* v. *Bowers*, 2 Vern. 202; *Jones* v. *Powell*, 1 Eq. Ab. 143, pl. 15, 16; *Cray* v. *Rooke*, Ca. temp. Tal. 155.

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but must be paid before legacies.

An agreement for payment of money in consideration of past cohabitation must be by an instrument under seal, the consideration not being sufficient to support a parol agreement: *Matthews* v. *L*——, 1 Madd. 558. And the bond or deed must be executed; for in matters *executory*, even on the consideration *præmium pudicitiæ*, the Court will not compel the party or his executors to fulfil an agreement to provide for a forsaken kept mistress: *Whaley* v. *Norton*, 1 Vern. 483.

But if there be any *fraud* practised on the woman, a Court of equity would afford her relief. Thus, where a man having debauched a young woman, and, intending afterwards to deceive her, made a settlement upon her of 30*l.* a year for life, out of an estate which was not his; the Court decreed him to make it good out of an estate which he had of his own; and this decree was afterwards affirmed on appeal to the House of Lords: *Carew* v. *Stafford*, 3 Swan. 427. And where Sir W. B. having seduced Mrs. O., a young lady of a good family, and entitled to 12,000*l.* fortune, settled on her 360*l.* per annum for years; but the estate being incumbered, and Mrs. O. dying, her administrator brought a bill in order to disincumber the land which was charged with this annuity, and was relieved accordingly: *Ord* v. *Blacket*, cited in *Annandale* v. *Harris*, 1 Eq. Ab. 87, pl. 6; 2 P. Wms. 433.

Fraud in relation to security, *præmium pudicitiæ*.

Under the maxim, that "equity relieves against accidents," (Grounds and Rudiments of Law and Equity, 87,) it seems, if the grantee in a voluntary deed, or the obligee in a voluntary bond, lose the deed or bond by accident, they may have remedy against the grantor or obligor, in equity:

Loss of a voluntary bond.

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Underwood v. *Staney*, 1 Ch. Ca. 78; 13 Vin. Ab. 104, pl. 4; though 1 Eq. Ab. 62, pl. 4, adds "*Quære*, for these matters are discretionary": and there certainly are some old cases *contrà: Miller* v. *Reames*, 1 Roll. Ab. 375, *Chancerie* (Q), pl. 1; *Vincent* v. *Beverlye*, Noy, 82; Pop. 205, 206. See *Toulmin* v. *Price*, 5 Ves. 235. Though, in a more modern case, where J. S., a little before his death, granted an annuity of 30*l.* per annum to his housekeeper, and entered into a voluntary bond for payment of the annuity, and the bond being lost, his representatives were decreed to pay the annuity, or the penalty of the bond, though it appeared that there were no wages due to her, service alone being a consideration; and no *turpis contractus* shall be presumed, unless proved: *Lightbone* v. *Weedesh*, 1 Eq. Ab. 24, pl. 7; 93, pl. 5.

3rd. Bonds, &c., for future cohabitation.

Bonds and contracts made with the intention of inducing future concubinage or prostitution are absolutely void: *Robinson* v. *Cox*, 9 Mod. 263; *Evans* v. *Carrington*, 30 L. J., Ch. 370. Though a Court of law will not inquire into the consideration of a bond, yet, if it appear to be illegal on the face of it, the Court cannot sanction the claim: thus a bond, reciting that the parties had agreed to *live together*, therefore the obligor had agreed to find the woman meat, drink, washing, lodging, &c., and to leave her an annuity of 60*l.* a year if *he* quitted her, or she outlived him: and if they had any child, he was to take care of and provide for it. But if *she* should leave him, or go to another man, then he should *not* be obliged to provide for her any longer, or leave her any annuity. Lord *Mansfield* said: "It is the price of prostitution, *præmium prostitutionis:* for if she *becomes virtuous*, she is to *lose* the annuity. It appears clearly, upon the condition, that the bond is illegal and void": *Walker* v. *Perkins*, 1 W. Bl. 517; 3 Bur. 1568. See *James* v. *Hoskins*, 1 Tidd, Pr. 593, where the Court ordered the bond to be delivered up, and set aside a judgment and other proceedings upon it. See also *Gray* v. *Mathias*, 5 Ves. 286; *Friend* v. *Harrison*, 2 C. & P. 584; *Rex* v. *Northwingfield*, 1 B. & Ad. 912.

Contracts void for immoral consideration.

If lodgings are let to a woman to enable her to live as a prostitute, there is no remedy for rent or

occupation; but if the lodger receives her visitors elsewhere, the letting is valid: *Appleton* v. *Campbell*, 2 C. & P. 347. See *Girardy* v. *Richardson*, 1 Bos. & P. 340; *Jennings* v. *Throgmorton*, 1 Ry. & M. 251; *Smith* v. *White*, L. R., 1 Eq. 626. So a contract to pay for the getting up of expensive articles of dress for a prostitute is good or bad according to the intention and purpose of the contract: *Bowry* v. *Bennett*, 1 Camp. 348; *Lloyd* v. *Johnson*, 1 Bos. & P. 340. One who makes a contract for sale or hire with the knowledge that the subject-matter of the contract is to be applied to an immoral purpose, cannot recover on the contract, and it is immaterial whether or not he looks to be paid out of the proceeds of the immoral acts. So when a coachbuilder supplied a person with a brougham on hire knowing her to be a prostitute, and that the brougham would be used, as in fact it was, as part of her display to attract men, it was held that he could not recover the hire, although there was no evidence that he expected to be paid out of the receipts of the woman's prostitution: *Pearce* v. *Brooks*, L. R., 1 Ex. 213. See further as to the supply of goods for immoral purposes, *Cannan* v. *Bryce*, 3 B. & A. 179; *McKinnell* v. *Robinson*, 3 M. & W. 434. Illegal Contracts.

Contracts relating to the publication of immoral works are generally void, and there is no copyright in such works: *Fores* v. *Johnes*, 4 Esp. 97. See also *Poplett* v. *Stockdale*, 2 C. & P. 198; *Hime* v. *Dale*, 2 Camp. 31; *Southey* v. *Sherwood*, 2 Mer. 435; *Walcot* v. *Walker*, 7 Ves. 1; *Lawrence* v. *Smith*, Jac. 471; *Hamilton* v. *Heetor*, L. R., 6 Ch. A. 701. Immoral works.

5. *Bonds for Gaming Debts.*]—By the 9th Ann. c. 14, all bonds and other securities given for money won at play, or money lent at the time to play with, are void as between the parties and all parties into whose hands they come, with notice of the nature of the consideration: *Edmond* v. *Groves*, 2 M., C. & W. 642. Horse-racing is gaming within this statute: *Blaxton* v. *Pye*, 2 Wils. 309; *Whaley* v. *Pagot*, 2 Bos. & P. 51; *Shillito* v. *Theed*, 5 Moo. & P. 303. Bonds for gaming debts.

The stat. 8 & 9 Vict. c. 109, s. 18, enacts that,—

"All contracts or agreements, whether by parol or in writing, Contracts by

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way of gaming to be void, and the wagers or sums deposited with stakeholders not to be recoverable at law.

Saving for subscriptions for prizes to winners of lawful games.

by way of gaming or wagering, shall be null and void: and no suit shall be brought or maintained in any Court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: Provided always, that this enactment shall not be deemed to apply to any subscription or contribution or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise."

A contract for sale of goods is void if the price is to depend on the result of a wager: *Rourke* v. *Short*, 5 E. & B. 904. An agreement between a principal and his agent that the agent shall employ money of the principal in betting, and pay over the winnings, is not void within this section: *Beeston* v. *Beeston*, 1 Ex. D. 13.

Where a person has lost money at play or in betting, and requests another to pay the money, the party so paying it will be allowed to recover: *Aleinbrook* v. *Hall*, 2 Wils. 309. So also where a bond was given to secure the payment of a sum of money to betting creditors of the obligor, in order to prevent them from posting him at Tattersall's as a defaulter, the claim was allowed: *Bubb* v. *Yelverton*, L. R., 9 Eq. 471. See also *Aubert* v. *Maze*, 2 Bos. & P. 371; *Knight* v. *Camber*, 15 C. B. 564; *Jessop* v. *Lutwyche*, 10 Exch. 614; *Rosewarne* v. *Billing*, 15 C. B., N. S. 316. As to the liability of a stakeholder, see *Robinson* v. *Mearns*, 6 D. & Ry. 26; *Varney* v. *Hickman*, 5 C. B. 271; *Moore* v. *Durden*, 2 Exch. 22; *McKinnell* v. *Robinson*, 3 M. & W. 434; *Hampden* v. *Walsh*, 1 Q. B. D. 189; *Batson* v. *Newman*, 1 C. P. D. 573; *Diggle* v. *Higgs*, 2 Ex. D. 422.

Usury and stock-jobbing.

6. *Usury and Stock-jobbing.*]—The taking of excessive interest for money was formerly prohibited, but the usury laws are now repealed by the stat. 17 & 18 Vict. c. 90. And the enactments in restraint of stock-jobbing have been abrogated by the stat. 23 Vict. c. 28.

General restraint of trade.

7. *Restraint of Trade.*]—A contract not to carry on a particular trade or occupation, unlimited in regard

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to locality, is generally void, as being against public policy, unless an adequate reason or consideration can be shown for such a restraint on the ordinary right, and indeed duty, of an individual: *Gunmakers' Co.* v. *Fell*, Willes, 334; *Hinde* v. *Gray*, 1 Scott, N. R. 123. The duration of the restriction, in point of time, is not material. In a very ancient case, a bond not to carry on the trade of a dyer for *half a year* was held void (*d*). So, in *Claygate* v. *Bachelor*, Owen, 143, a restraint for four years was held bad; per *Anderson*, J.: "I might as well bind myself not to go to church." Again, in the case of *Ward* v. *Byrne*, 5 M. & W. 548, a bond was held void which, reciting that the obligor had been taken into the service of the obligee (a coal merchant), as traveller and clerk, was conditioned that the obligor should not follow or be employed in the business of a coal merchant for *nine months* after he should have left the employment of the plaintiff. The principle on which the cases stand is very clearly laid down by *Tindal*, C. J., in *Hitchcock* v. *Coker*, 6 A. & E. 438, where he says: "When the restraint of a party, from carrying on a trade, is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void. Now a restraint, prohibiting a party from carrying on trade within certain limits of *space*, would be good; and a contract entered into for the purpose of enforcing such an agreement as that would be valid; and the limit of the space is that which, according to the trade he carries on, is necessary for the protection of the party with whom the contract is made; and all the cases cited appear

Ward v. Byrne.

(*d*) 2 Hen. 5, pl. 20, "Det fuit port sur un obligation p. un John Dier; ou le def. alleage per Lod. per certeine indenture qu'il mist avant, et sur condition q. si le def. ne usent my son art de Dier's craft *deins le ville ou le pl'. etc.*, p. certein temps, s., p. demy an, q. l'obligation perdra sa force; et dit q. ne usist my son art de Dier's craft en letemps limit, quel matt. il voile averrer, et ddom' judgemens si action, &c. *Hull:* A ma intent, vous purres aver demurre sur luy, q. l'obligation est voide, eo q. le condition encount' common ley; et per Dieu si le pl'. fuit icy, il irra al prison, tanq. il ust fait fine au roy."

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to me to turn on the question as to the limit of space within which the restriction should extend. Now, where a limit as to space is imposed, the public, on the one hand, do not lose altogether the services of the party in the particular trade; he will carry it on in the same way elsewhere; nor, within the limited space, will they be deprived of the benefit of the trade being carried on, because the party with whom the contract is made will, most probably, within those limits, exercise it himself. But when a general restriction, limited only as to *time*, is imposed, the public are altogether losers, for that time, of the services of the individual, and do not derive any benefit whatever in return; and, looking at the authorities cited upon this subject, it does not appear that there is one clear authority in favour of a total restriction on trade, limited only as to time." There is not, however, any absolute rule that a covenant in restraint, unlimited in point of space, is void; but the question in each case is whether the restraint extends further than is necessary for the reasonable protection of the obligee or covenantee: *Mitchell* v. *Reynolds*, 1 P. Wms. 181 (*e*); *Tallis* v. *Tallis*, 1 E. & B. 391; *Leather Cloth Co.* v. *Lorsont*, L. R., 9 Eq. 345; *Rousillon* v. *Rousillon*, 14 Ch. D. 351.

Where the contract is not general, but leaves the party at liberty to trade, &c., under particular circumstances, it may be good, if founded on adequate consideration, and reasonable, that is, not carried beyond the limits which are requisite for the protection of the party from whom the consideration moves: *Prugnell* v. *Gosse*, Aleyn, 67; 1 Roll. Ab. 16, pl. 6; *Gelliet* v. *Broade*, Noy, 98. Thus, where a carrier, by deed, assigned his trade and business as a carrier between London and Wisbeach, and, in consideration of the covenants on the vendees' part, covenanted with them that he would not thenceforth, during his life, exercise the trade of a carrier, except under the circumstances thereinafter mentioned: and that he would thenceforth, during his life, faith-

Wallis v. *Day.*

(*e*) See also the notes to this case in Smith's Leading Cases, pp. 356 *et seq.*, where the cases on this subject are collected.

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fully serve the vendees as an assistant in the trade of a carrier, in consideration whereof the vendees covenanted to pay him a salary during his life; the covenants were held to be valid. Per Lord *Abinger*, C. B.: "The rule of law is, that a contract in general restraint of trade is void, as being against the policy of the law; but if the contract be made on sufficient consideration, and the public gain some advantage, it will be good. Suppose a man engaged in trade is desirous, when old age approaches, of selling the goodwill of his business, why may he not bind himself to enter into the service of another, and to trade no more on his own account? So long as he is able, he is bound to render his services, and it cannot be said to be a contract in absolute restraint of trade when he contracts to serve another for life in the same trade:" *Wallis* v. *Day*, 2 M. & W. 273.

For the same reason, it seems that a bond, covenant, or promise not to use a trade with *particular customers* by name, if founded on a good consideration, is also valid: *Hunlocke* v. *Blacklowe*, 2 Wms. Saund. 156. All the cases on this subject, prior to *Mitchell* v. *Reynolds*, 1 P. Wms. 181, are noticed in that case.

Davis v. *Mason.*

Where the condition of a bond was, that, in consideration A. would take B. as an assistant in his business as a surgeon, for so long a time as it should please A., B. agreed not to practise on his own account for fourteen years within ten miles of the place where A. lived, the bond was held good: *Davis* v. *Mason*, 5 T. R. 118. See *Sloman* v. *Walter*, 1 B. C. C. 418; *Gale* v. *Reed*, 8 East, 80; *Crutwell* v. *Lye*, 17 Ves. 335.

As to the power of corporations to make bye-laws in restraint of trade, see *Wannell* v. *City of London*, 1 Str. 675; *Rex* v. *Harrison*, 3 Burr. 1322; *Hesketh* v. *Bradock*, Id. 1847; *Pierce* v. *Bartrum*, Cowp. 269; *Gunmakers' Comp.* v. *Fell*, 1 Willes, 384; Id. 388, n.; *Chamberlain of London* v. *Compton*, 7 D. & Ry. 597. Such laws may be supported, if made in support of a special custom, but not otherwise, though by charter. In the case in Willes, a bye-law of the company of gunmakers that no member should sell the barrel of

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any hand-gun, &c. ready proved, to any person of the trade not a member, in London, or within four miles; and that no member should strike his stamp or mark on the barrel of any person not a member of the company, &c. under a penalty of 10*s.*, was held invalid, it not appearing that there was any adequate reason or consideration to the persons restrained.

Restraint must not be carried beyond that point which is necessary for the party's protection.

Horner v. *Greaves.*

The restraint in point of space must be *reasonable.* Thus, in *Horner* v. *Greaves*, 5 Moo. & P. 768, the defendant covenanted to serve the plaintiff as an assistant in the business of a surgeon-dentist for five years, the plaintiff covenanted to pay him a salary of 120*l.*, increasing by 50*l.* each year, with power to dismiss him at any time at three months' notice; and the defendant covenanted not to practise the business of a surgeon-dentist *within one hundred miles* of the city of York whilst the plaintiff continued to practise there, under a penalty. The covenant was held void. *Tindal*, C. J., after remarking on the inadequacy of the consideration, proceeded:—"But the greater question is, whether this is a reasonable restraint of trade; and we do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either, it can only be oppressive, and if oppressive, it is in the eye of the law unreasonable. Whatever is injurious to the interest of the public, is void on the ground of public policy. . . . . No certain precise boundary can be laid down within which the restraint would be reasonable, and beyond which excessive. In *Davis* v. *Mason*, 5 T. R. 118, where a surgeon had restrained himself not to practise within ten miles of the plaintiff's residence, the restraint was held reasonable. In one of the cases referred to by the plaintiff (*Bunn* v. *Guy*, 4 East, 190), one hundred and fifty miles was not considered an unreasonable restraint, where an

attorney had bought the business of another who had retired from the profession. But it is obvious that the profession of an attorney requires a limit of a much larger range, as so much may be carried on by correspondence or by agents. And unless the case was such that the restraint was plainly and obviously unnecessary, the Court would not feel itself justified in interfering. It is to be remembered, however, that contracts in restraint of trade are in themselves, if nothing more appears to shew them reasonable, bad in the eye of the law; and upon the bare inspection of the deed it must strike the mind of every man that a circuit round York, traced with the distance of one hundred miles, incloses a much larger space than can be necessary for the plaintiff's protection. The nature of the occupation, which is one that requires the personal presence of the practitioner and the patient together at the same place, shews at once that the plaintiff has shut out the defendant from a much wider field than can by possibility be occupied beneficially by himself. There is, therefore, on the one hand, no reason why the defendant should not gain his livelihood; nor, on the other, why the public should not derive the benefit of his skill and industry through so wide a space" (*f*). Illegal Contracts.

Where the contract is not to carry on business within a certain distance of a particular place, it seems that the distance will be measured "as the crow flies:" *Lake* v. *Butler*, 5 E. & B. 92; *Duignan* v. *Walker*, 28 L. J., Ch. 867; *Mouflet* v. *Cole*, 8 Ex. 32. Distance, how measured.

(*f*) The following limits in point of space have been held to be reasonable: one mile in the case of a fruiterer; *Pemberton* v. *Vaughan*, 16 L. J., Q. B. 161; five miles in reference to the business of a cowkeeper and milkman; *Proctor* v. *Sargent*, 2 Scott, N. R. 289; twenty miles in the case of a surgeon; *Hayward* v. *Young*, 2 Chit. 407; *Atkyns* v. *Kinnier*, 4 Exch. 776; *Caines* v. *Nisbett*, 7 H. & N. 678; the limits of the metropolis in the case of a dentist; London and 150 miles from thence in the case of a publisher; *Horner* v. *Graves*, 7 Bing. 735; and Birmingham and 200 miles from thence in the case of a horse-hair manufacturer; *Harms* v. *Parsons*, 32 Beav. 328. But 600 miles from any particular spot in this kingdom "is out of all reason and absolutely void." See *Price* v. *Green*, 16 M. & W. 346.

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Adequacy of consideration.

Hitchcock v. *Coker*.

The Court will not, generally, scrutinize the adequacy of the consideration for a restraint of this nature. It seems to be sufficient that the consideration be valuable, and not merely nominal or colourable. See as to statement and adequacy of the consideration, *Homer* v. *Ashford*, Moo. 91; *Hitchcock* v. *Coker*, 6 Ad. & E. 438. "Undoubtedly, in most, if not all, of the decided cases, the judges in delivering their opinion that the agreement in the particular instance before them was a valid agreement, have used the expression that such agreement appeared to have been made on an adequate consideration, and seem to have thought that an adequacy of consideration was essential to support a contract in restraint of trade. If by the expression it is intended only that there must be a good and valid consideration, such consideration as is essential to support any contract not under seal, we concur in that opinion. If there is no consideration, or a consideration of no real value, the contract in restraint of trade which, in itself, is never favoured in law, must either be a fraud upon the rights of the party restrained, or a mere voluntary contract, a *nudum pactum*, and therefore void. But if by adequacy of consideration more is intended, and that the Court must weigh whether the consideration is equal in value to that which the party gives up or loses by the restraint under which he has placed himself, we feel ourselves bound to differ from that doctrine. A duty would thereby be imposed upon the Court in every particular case which it has no means whatever to execute. It is impossible for the Court, looking at the record, to say whether in any particular case the party restrained has made an improvident bargain or not. The receiving instruction in a particular trade might be of much greater value to a man in one condition of life than in another, and the same may be observed as to other considerations. It is enough, it appears to us, that there actually is a consideration for the bargain, and that such consideration is a legal consideration and of some value." Per *Tindal*, C. J., in *Hitchcock* v. *Coker*, *ubi supra*.

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The above decision appears to be consistent with the reason upon which the general rule is founded, which, being public policy, or the benefit of the public, has, obviously, in determining the validity of a particular restraint upon a man's industry, nothing whatever to do with the providence or improvidence of the bargain as regards himself.

In the case of *Leighton* v. *Wales*, 3 M. & W. 545, *Parke*, B., said that it is clear since the case of *Hitchcock* v. *Coker*, that the Court cannot inquire into the extent or adequacy of the consideration.

Archer v. *Marsh*.

Hitchcock v. *Coker* was approved of and followed in the case of *Archer* v. *Marsh*, 2 Nev. & P. 562, where it was held that the parties must act on their own view as to the adequacy of the consideration. See *Pilkington* v. *Scott*, 15 M. & W. 657.

No restraint implied on sale of goodwill.

A contract not to exercise a trade within a certain district is not implied by the sale of the goodwill of the business: *Shackle* v. *Baker*, 14 Ves. 468; *Crutwell* v. *Lye*, 17 Ves. 335. But the vendor of a business and the goodwill thereof will not be allowed to solicit old customers of the business he has sold, to give their custom to himself instead of to the purchaser: *Labouchere* v. *Dawson*, L. R., 13 Eq. 322; *Leggott* v. *Barrett* (C. A.), 15 Ch. D. 306. This rule, however, does not apply to compulsory alienation by a trustee in bankruptcy: *Walker* v. *Mottram*, 19 Ch. D. 355.

Associations for mutual protection in trade.

An agreement mutually entered into by two travelling trunk makers not to interfere with each other's business in certain districts, and not to aid or assist any person in opposing each other, and that if any person should set up and oppose either of the parties they would meet together and enter into such mutual agreement as should be beneficial to their mutual interests, not operating in general restraint of trade, has been held good: *Wickens* v. *Evans*, 3 Y. & J. 318. See also *Collins* v. *Locke*, 4 App. Ca. 674. And see as to agreements between railway companies not to compete with each other, *Shrewsbury & Birmingham Rail. Co.* v. *London & North-Western Rail. Co.*, 31 L. J., Q. B. 89.

Combination of employers and workmen.

A contract whereby a number of employers bind themselves to close their works in obedience to reso-

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lutions of the majority has been held to be void as being in restraint of trade: *Hilton* v. *Eckersley*, 6 E. & B. 47. So, also, a contract between certain workmen who formed an association, the members of which were not to work except on certain prescribed conditions, and were to be supported when on strike, was held not to be enforceable at law: *Hornby* v. *Close*, L. R., 2 Q. B. 153. As to trades unions the stat. 34 & 35 Vict. c. 31, enacts as follows:—

Trade union not unlawful for civil purposes.

Sect. 3. "The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust.

Trade union contracts, when not enforceable.

Sect. 4. "Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely—

(1.) Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union, shall or shall not sell their goods, transact business, employ or be employed:

(2.) Any agreement for the payment by any person of any subscription or penalty to a trade union:

(3.) Any agreement for the application of the funds of a trade union—

(a) To provide benefits to members; or

(b) To furnish contribution to any employer or workmen, not a member of such trade union, in consideration of such employer or workmen acting in conformity with the rules or resolutions of such trade union; or

(c) To discharge any fine imposed upon any person by sentence of a Court of Justice; or

(4.) Any agreement made between one trade union and another; or

(5.) Any bond to secure the performance of any of the above-mentioned agreements.

But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful."

A contract in restraint of trade contained in indentures of apprenticeship, will not bind the infant: *Capes* v. *Hutton*, 2 Russ. 357.

Remedy on agreement.

Equity will restrain a party who has entered into a binding contract not to carry on business to the injury of another person, from acting in breach of his engagement: *Harrison* v. *Gardner*, 2 Madd. 198;

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Shackle v. *Baker*, 14 Ves. 468; *Cruttwell* v. *Lye*, 17 Ves. 335; *Williams* v. *Williams*, 2 Swanst. 253; and that, even after the covenantee has ceased to carry on the business: *Elves* v. *Crofts*, 10 C. B. 241. But it will not interfere where the negative part of the engagement is connected with a positive contract to do something, which the Court, either from the nature of the thing, or the vagueness of the terms of the contract, is unable to enforce; as where an actor bound himself to act at A.'s theatre, and not elsewhere, the Court, being unable to oblige him to act at A.'s theatre, refused to enjoin him from acting elsewhere: *Kemble* v. *Kean*, 6 Sim. 333. See *Kimberley* v. *Jennings*, Id. 340; *Smith* v. *Fromont*, 2 Swanst. 330; *Baldwin* v. *Soc. Diff. Usef. Knowl.* 9 Sim. 393. But see *Morris* v. *Colman*, 18 Ves. 437.

Sale of the goodwill of solicitor's business.

Bunn v. *Guy*.

The validity of the sale of the goodwill of a solicitor's business, accompanied with partial restrictions on the practice of the vendor, was questioned and established in the case of *Bunn* v. *Guy*, 4 East, 190, which was a case sent from Chancery for the opinion of B. R., and of which the circumstances were as follows:—A., an attorney, by articles of agreement under seal, covenanted with C. and D. to relinquish to them the benefit of his business as an attorney, so far as respected his practice within London and 150 miles from thence, and all his business as an agent; that he would not practise as an attorney, &c., within those limits; and that he would endeavour by every means in his power to induce his clients to become the clients of B. and C., and would induce them by personal application and otherwise, and would also permit them to practise under the firm of A., B., and C. for one year, and afterwards for one year more, if B. and C. should so long require to use his name in the firm; that he (A.) would not claim any share in the profits of the business, being indemnified from all losses, and that B. and C. should carry on the business in the same manner as if A.'s name were not used. In consideration of this, B. and C. covenanted to pay A. 1000*l.*, and secure him 1000*l.* more at a future day, and an

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annuity of 600*l.* for seven years, and to indemnify him from all losses; and that, in default of payment of the annuity, it shall be lawful for A. to resume the business. The question was, whether this contract was good in law, so that A. could recover the money stipulated to be paid, in an action against B. and C. It was contended, 1st, That the deed was without consideration, the goodwill of an attorney's business being personal, depending upon his integrity and skill in his profession, and therefore incapable of transfer; 2ndly, That the permission by A. to B. and C. to use his name was contrary to the policy of the law, being inconsistent with his duty as an officer of the Court, which was a personal trust; 3rdly, That the agreement to recommend B. and C. was contrary to morality, being absolute, and not provided they continued worthy of the recommendation. The Court, however, overruled all these objections, and certified in favour of the validity of the deed.

The certificate thus sent was acted upon by Lord *Eldon*, though it seems not to have had his Lordship's cordial acquiescence; for on a later occasion, alluding to this case, he said, "I doubted whether professional men would be recommended, not for skill and knowledge in their profession, but for a sum of money paid and advanced. I knew that this would rip up many transactions, and I was happy that the Court of King's Bench was of a different opinion, though *I never could entirely reconcile myself to their doctrine*." See his Lordship's judgment in *Candler* v. *Candler*, Jac. 231. Lord *Ellenborough's* answer to the objection suggested by Lord *Eldon* was, that the agreement to recommend must be considered as founded on the assumption that the parties continue worthy of recommendation. See *Bozon* v. *Farlow*, 1 Mer. 459.

Covenant by partners not to engage in the same or any other business.

Of course, a covenant in a partnership deed, not to engage separately in a similar business to that of the partnership, is not obnoxious to the principle of public policy, which prohibits general restraint upon trade. If authority were necessary in support of so clear a proposition, we have that of Lord *Eldon*, who has observed:—"In partnership engagements, a

covenant, that the partners shall not carry on, for their private benefit, that particular commercial concern in which they are jointly engaged, is not only permitted, but is the constant course." See *Morris* v. *Colman*, 18 Ves. 438. And even if the covenant were not so restricted, but extended, as such covenants frequently are, to every species of trade, it is conceived the objection would be equally untenable; for though the public weal may be prejudiced by a man being under an obligation wholly to abstract himself from commerce, yet the same detrimental consequence is not likely to ensue from his exertions being confined to a single pursuit.

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If the vendor has stipulated not to carry on the business, he may be restrained by injunction from doing so: *Hardy* v. *Martin*, 1 Cox, 26; *Williams* v. *Williams*, 2 Swanst. 253. And where a person had received a sum of money under an award (and the same principle, it is conceived, would apply to any other instrument), as a consideration for the purchase of the goodwill of a business, with an understanding that he was not to set up trade in the vicinity of the same place, the Court would not allow him to act in opposition to this understanding, though the award itself was silent as to the prohibition: *Harrison* v. *Gardner*, 2 Madd. 198.

Injunction against the breach of agreement not to exercise a business.

It is usual, however, for the purchaser of the goodwill of a business to stipulate for a still more powerful protection against the violation of the covenant under consideration, by means of a provision, entitling him to a specific sum by way of liquidated damages, in case of breach: (*vide ante*, pp. 287 *seq.*). The advantage of a provision of this kind to a purchaser is obvious, in preventing the necessity of his adducing evidence of the extent of the injury he has sustained,—evidence which, from the nature of the case, it is often very difficult to obtain; and in entitling him to recover a sum frequently far exceeding the amount of that injury. It therefore behoves a vendor to use caution in entering into such a covenant, or rather to see that, having entered into, he does not violate, it; for the seeming disproportion, however great, between the sum fixed as

Liquidated damages.

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damages, and the estimate of the actual amount of loss, would not of itself afford any ground for relief.

Such covenant, how construed.

The rule, *expressio unius est exclusio alterius*, applies to these covenants; and, therefore, if a party covenant not to be engaged in a particular business, it is to be presumed that all others are left open to him. Upon this principle, *Leach*, V.-C., was of opinion, that a covenant in the articles of partnership of the proprietors of a London morning newspaper, that they would not be concerned in any other *morning* paper, afforded the conclusion that it was the intention of the parties that they might engage in the concern of any *evening* paper. But even independently of positive contract directed to this point, the principles of equity would not permit parties united in a common undertaking to engage in another concern, which gave them an interest adverse to that undertaking; and, therefore, in the case referred to, the Vice-Chancellor relied much upon the fact, that the act of the defendants in becoming proprietors of the evening paper gave them no interest adverse to the other paper in which the plaintiff was concerned, and refused the injunction generally; but though the plaintiff appeared to have acquiesced in the co-proprietorship complained of, his Honour granted an injunction, restraining the defendants from first publishing in the evening paper any information obtained at the expense of the other: *Glassington* v. *Thwaites*, 1 S. & S. 133.

A partner is not restrained by such a covenant from soliciting future business: *Coates* v. *Coates*, 6 Madd. 287. In *Cooper* v. *Watson*, 2 Chitt. 421, articles of partnership between two brewers for eleven years, with a proviso, that if either party should be so minded, on giving six months' notice to the other, he should be at liberty to quit the trade and mystery of a brewer, and the other should be at liberty to continue the trade on his own account, were held to restrain the party quitting from carrying on the business.

Harrison v. *Gardner.*

On one of two partners retiring from trade, it was left to arbitrators to determine, amongst other things, what was to be paid to the retiring partner

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for the goodwill of the trade; and they, on the understanding that the retiring partner would not set up the trade in the same street, or its vicinity, awarded 500*l.*, as the share of the retiring partner for the goodwill, which was paid; but no mention was made in the award as to the retiring partner not carrying on the trade in the same street or its vicinity. Afterwards, he having set up the trade in the same street, a decree was made, on parol evidence of the understanding on which the award was made, enjoining him, on the ground of fraud, from carrying on the same trade in the same street or its vicinity: *Harrison* v. *Gardner*, 2 Madd. 198.

Sale of trade secret.

A trader may sell a secret of business, and restrain himself generally from using that secret: *Bryson* v. *Whitehead*, 1 S. & S. 74; *Leather Cloth Co.* v. *Lorsont*, L. R., 9 Eq. 345. As to the jurisdiction of the Court in protecting secrets of inventions, &c., see *Newbury* v. *James*, 2 Mer. 446; *Williams* v. *Williams*, 3 Mer. 157; *Canham* v. *Jones*, 2 Ves. & B. 218; *Yovatt* v. *Winyard*, 1 Jac. & W. 394; *Carter* v. *Goetze*, 2 Keen, 581. As to the validity of a contract to abstain from printing the patterns of another person, see *Stuart* v. *Nicholson*, 3 Scott, 536.

Monopolies.

Contracts creating monopolies generally are regarded as contrary to public policy, as being in restraint of trade. By the stat. 21 Jac. 1, c. 3, all monopolies, grants, letters patent, and licences, for the sole buying, selling and making of goods and manufactures, are declared void, except in some particular cases; but this does not extend to any grant or privilege granted by Act of Parliament; or to any grant or charter to corporations or cities, &c.; or to grants to companies or societies, for enlargement of trade; or to inventors of new manufactures, who have patents, &c. See the *Case of Monopolies*, 11 Rep. 86 b; and see *infra*, tit. Patents. As to covenants by lessees of public houses, to buy beer, &c., from a particular brewer, see *infra*, tit. Leases.

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Stamps on Bonds.

The Schedule to the Stamp Act, 1870 (33 & 34 Vict. c. 97) imposes the following duties in respect of bonds:—

Bond for securing the payment or repayment of money or the transfer or retransfer of stock.

See Mortgage, &c.

Bond in relation to any annuity upon the original creation and sale thereof.

See Conveyance on Sale, and sect. 75 (*g*).

Bond, Covenant, or Instrument of any kind whatsoever.

(1.) Being the only, or principal, or primary security for any annuity (*except upon the original creation thereof by way of sale or security*), or of any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack.

For a definite and certain period, so that the total amount to be ultimately payable can be ascertained ..... The same ad valorem duty as a bond or covenant for such total amount.

For the term of life or any other indefinite period.

For every 5*l.*, and also for any fractional part of 5*l.*, of the annuity or sum periodically payable 0 2 6

(2.) Being a collateral, or auxiliary, or additional, or substituted security for any of the above-mentioned purposes, where the principal or primary instrument is duly stamped.

Where the total amount to be ultimately payable can be ascertained ..... The same ad valorem duty as a bond or covenant of the same kind for such total amount.

In any other case:

For every 5*l.*, and also for any fractional part of 5*l.*, of the annuity or sum periodically payable 0 0 6

Bond given pursuant to the directions of any Act of Parliament, or by the directions of the Commis-

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(*g*) See also as to stamps on annuities, *ante*, Vol. 1, p. 704, tit. Annuities.

sioners of Customs or Inland Revenue, or any of their officers, for or in respect of any of the duties of customs or excise, or for preventing frauds or evasions thereof, or for any other matter or thing relating thereto.

Where the penalty of the bond does not exceed 150*l.* ..... The same ad valorem duty as a bond for the amount of the penalty.

And in any other case 0 5 0

Exemption.

Bond given as aforesaid upon, or with relation to, the receiving or obtaining, or for entitling any person to receive or obtain, any drawback of any duty or duties, or part of any duty or duties, of customs or excise, for or in respect of any goods, wares, or merchandise exported or shipped to be exported from the United Kingdom to any parts beyond the seas, or upon or with relation to the obtaining of any debenture or certificate for entitling any person to receive any such drawback as aforesaid.

And see section 58 (*h*).

Bond on obtaining letters of administration in England or Ireland, or a confirmation of testament in Scotland 0 5 0

Exemptions.

(1.) Bond given by the widow, child, father, mother, brother or sister, of any common seaman, marine or soldier, slain or dying in the service of her Majesty, her heirs or successors.

(2.) Bond given by any person where the estate to be administered does not exceed 100*l.* in value.

(*h*) Sect. 58 of the above Act is as follows:

"If any person required by any Act of Parliament, or by the direction of the Commissioners of Customs or Inland Revenue, or any of their officers, to give or enter into any bond for or in respect of any duties of customs or excise, or for preventing frauds or evasions thereof, or for any matter or thing relating thereto, includes in one and the same bond any goods or things belonging to more persons than one, not being co-partners or joint tenants, or tenants in common, he shall for every such offence forfeit the sum of fifty pounds."

Bonds not to include goods, &c. belonging to more than one person.

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BOND of any kind whatsoever not specifically charged with any duty:

Where the amount limited to be recoverable does not exceed 300*l*.	The same ad valorem duty as a bond for the amount limited.
In any other case	0 10 0

BOND, accompanied with a deposit of title deeds, for making a mortgage, wadset, or other security on any estate or property therein comprised.

See MORTGAGE, &c., and sect. 105 (*i*).

BOND, DECLARATION, or other DEED or WRITING for making redeemable any disposition, assignation, or tack, apparently absolute, but intended only as a security.

See MORTGAGE, &c., and sect. 105.

(*i*) This section contains an interpretation of the term mortgage for the purposes of the Act.

PRECEDENTS.

I. *BOND for Payment of* MONEY *and* INTEREST, *either in one Sum or by Instalments, and either with one, two, three, or more Obligors, or one, two, three, or more Obligees.*

Common obligation from one to one.

KNOW ALL MEN BY THESE PRESENTS, that I (*a*) [*obligor*], of &c., am bound to (*b*) [*obligee*], of &c., in the sum of [*generally double the amount of the principal sum to be secured*], to be paid to the said (*c*) [*obligee*], or to his executors, administrators, or assigns, or his or their attorney or attorneys; For which payment I (*d*) bind myself (*e*) firmly

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Two or more obligors.

(*a*) If there be two or more obligors, "We [*names, addresses, and descriptions of obligors*] are bound, &c.

Two or more obligees.

(*b*) If there be two or more obligees, "[*names, addresses, and descriptions of obligees*]."

(*c*) "[*obligees*], or to their certain attorney, executors, administrators, or assigns; For," &c.

Two obligors.

(*d*) If there be two or more obligors, say, "We jointly and severally bind ourselves," &c.

The form of an obligation when there were several obligors was, "We bind ourselves and each of us, and any four, three, or two of us jointly and severally," &c.; but the words above given are all that are now required. By Order XVI. of the Rules of the Supreme Court, 1883, rule 4, it is provided that "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment." And by rule 6 of the same Order, "The plaintiff may, at his option, join as parties to the same action all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange and promissory notes."

(*e*) Formerly it was necessary that the heirs should be expressly named in an instrument under seal, otherwise they were not chargeable: *Barber* v. *Fox*, 2 Saund. 136; 3 Bac. Abr. 458. Now, however,

I. Payment of Money and Interest.

by these presents; Sealed with my seal: Dated this ——— day of ———, 18—.

it is enacted by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 59, that,

"(1). A covenant and a contract under seal, and a bond or obligation under seal, though not expressed to bind the heirs, shall operate in law to bind the heirs and real estate, as well as the executors and administrators and personal estate of the person making the same, as if heirs were expressed.

"(2). This section extends to a covenant implied by virtue of this Act.

"(3). This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond or obligation, and shall have effect subject to the terms of the covenant, contract, bond or obligation, and to the provisions therein contained.

"(4). This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this Act" (*i. e.*, 1st January, 1882).

The effect of this enactment is that a bond or contract under seal now renders the real estate of the obligors directly liable, although the heirs are not named. Although in the administration of estates of deceased persons, specialty debts binding the heirs stand in equal degree with simple contract debts (see stat. 32 & 33 Vict. c. 46), the position of a specialty creditor still confers the advantage of being able, under the stat. 11 Geo. 4 & 1 Will. 4, c. 47, to sue the heir or devisee personally for the debt, and to obtain judgment against him to the extent of the assets which have come into his hands. In order to obtain such judgment it is not necessary to obtain probate of the will, or take out letters of administration of the estate of the deceased, as must be done in bringing an administration action. And a creditor having so obtained judgment will be entitled to claim as against the real estate of the deceased in priority to other creditors. See as to the position of judgment creditors, *Re Williams*, L. R., 15 Eq. 270; *Smith* v. *Morgan*, 5 C. P. D. 337. By virtue of the section above stated a specialty creditor is enabled to sue the heir or devisee personally, although the heirs are not expressly named.

The executors and administrators are bound by every bond or covenant without being named: Dyer, 14 pl. 69: for any word which will prove a man a debtor, if it be by writing, will charge his executor or administrator: Noy's Max. 105.

By sect. 60 of the Conveyancing and Law of Property Act, 1881, it is enacted that, "(1) A covenant and a contract under seal and a bond or obligation under seal, made with two or more jointly, to pay money or to make a conveyance, or to do any other act to them or for their benefit, shall be deemed to include, and shall, by virtue of this Act, imply, an obligation to do the act to or for the benefit of the survivor or survivors of them, and to or for the benefit of any other person to whom the right to sue on the covenant, contract, bond, or obligation devolves."

The remaining sub-sections are similar to sub-sects. 2, 3, and

I. Payment of Money and Interest.

Condition of a bond from one to one, for payment of money and interest.

(*f*) THE CONDITION of the above-written bond or obligation is such, that if the above-bounden (*g*) [*obligor*], his heirs, executors, or administrators, should pay or cause to be paid unto the said [*obligee*] (*h*), his executors, administrators, or assigns, the sum of £———, with interest for the same after the rate of five pounds for one hundred pounds for a year (*i*), upon the ——— day of [*generally six months from*

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4 of sect. 59, *supra*. In the case, therefore, of a bond entered into with two or more obligees, words of survivorship may be omitted.

Having regard to the fact that sect. 58—that covenants relating to lands of inheritance shall be deemed to be made with the covenantee, his heirs and assigns—does not apply to bonds, it has been thought well, in these Precedents, to retain the practice of expressly mentioning the representatives and assigns of the obligee in the obligation. It is also considered that it is advisable to mention expressly the heirs, &c. of both obligor and obligee as heretofore in the *condition* of a bond, in order that the covenants in which the bond is to be avoided may be set forth with strict accuracy.

(*f*) If there be a surety or sureties, it seems prudent to say, "WHEREAS the above-bounden [*surety*] has [*or* (*sureties*) have] agreed to join with the said [*principal*] in the above-written bond, subject to the condition hereunder written, as a surety [*or* sureties] for the said [*principal*], his heirs, executors, and administrators. NOW THEREFORE THE CONDITION," &c.

(*g*) If there be two obligors, say,
"the said [*obligors*], or either of them, or the heirs, executors, or administrators of them or of either of them," &c., *ut supra*.

If there be three or more, say,
"the above-bounden [*obligors*], or any of them, or the heirs, executors, or administrators of them or of any of them," &c.

To two or more.

(*h*) If there be two or more obligees, say,
"[*obligees*], their executors, administrators, or assigns, the sum, &c.

By instalments.

(*i*) If to be paid by instalments, say,
"in the manner following: that is to say, the sum of £——— on the ——— day of ——— now next ensuing; the sum of £——— on the ——— day of ——— then next following; and the sum of £——— on the ——— day of ———, in the year 18—; Together with interest, after the rate afore-

I. Payment of Money and Interest.

the date] now next ensuing, without any deduction, then the above-written bond shall be void, or otherwise shall be and remain in full force.

SIGNED, SEALED and DELIVERED in the presence of }

II. *BOND from one to two, for Payment of* 1,180*l.* *by Four* INSTALMENTS; *which the Obligees have agreed to take in full discharge of a Debt of* 3,030*l.*, *if the Instalments should be regularly paid: and* AGREEMENT *that if the Instalments are not duly paid, such Payments as shall be made shall only be a partial Discharge of the* 3,030*l.*

KNOW ALL MEN, &c. [*obligation from one to two, ut ante*, p. 345, nn. (*b*) (*c*)].

Recital of debt.

WHEREAS the above-bounden [*obligor*] is indebted to the above-named [*obligees*] in the sum of 3,030*l.*: AND

Inability to pay.

WHEREAS the above-bounden [*obligor*] is unable to fully satisfy and pay to the said [*obligees*] the said debt, and the

Agreement to accept part payment by instalments,

said [*obligees*] have agreed to accept from the above-bounden [*obligor*] the sum of 1,180*l.*, payable by instalments, as hereinafter is mentioned, in full satisfaction and discharge of the

if regularly paid.

said debt or sum of 3,030*l.*, provided the said sum of 1,180*l.* be regularly paid as is hereinafter mentioned. NOW THE

Condition for payment of sum by instalments.

CONDITION of the above-written bond is such, that in case the above-bounden [*obligor*], his heirs, executors, or administrators, or any of them, shall pay to the above-named [*obligees*] (*k*), their executors, administrators, or assigns, the sum of 1,180*l.* by instalments, and in manner hereinafter mentioned; that is to say, the sum of 295*l.*, part thereof, within six months next after the day of the date of the above-written bond;

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said, on each of the said days of payment, for the said principal sum of £———, or so much thereof as at or immediately before the payment of such instalments shall be due and owing, without," &c.

Survivorship.

(*k*) It is not now necessary to say "and the survivors or survivor of them," &c. See *ante*, p. 347, n. (*e*).

II. Payment by Four Instalments.

the further sum of 295*l.* within twelve calendar months next after the day of the date of the above-written bond; the further sum of 295*l.* within eighteen calendar months next after the day of the date of the above-written bond; and the further sum of 295*l.*, to make up and complete the said sum of 1,180*l.*, within twenty-four calendar months next after the day of the date of the above-written bond; then, and in such case, the above-written bond shall be void; but, in case of failure in payment of all and every or any of the several sums of money aforesaid, within the respective times aforesaid, the said bond shall remain in full force; but so nevertheless that in case of failure in making the several payments aforesaid, or any of them, within the respective times aforesaid, this bond, or any payment or payments to be made under the same, shall not be construed or taken as a satisfaction or discharge of the said debt or sum of 3,030*l.*, or of any further or other part thereof, than shall have been actually paid under this bond (*l*); but, in such case the whole of the said sum of 3,030*l.*, or so much thereof as shall not have been actually paid as aforesaid, shall forthwith become payable to the said [*obligees*], and be recoverable accordingly.

Agreement that, if instalments are not duly paid, payments made shall only be partial discharge.

III. *POST OBIT BOND with a Surety for securing a Sum if the Vendor should survive his Father.*

KNOW ALL MEN [*joint and several obligation, ut ante*, p. 345, n. (*d*)].

Obligation.

WHEREAS the above-named [*obligee*] has contracted with the above-bounden [*principal*] for the purchase of the sum

Recital of contract for purchase of 2,500*l.*

(*l*) As the obligees by the recital agree to take the sum secured by the bond as a discharge for the debt, they should sign the bond.

Notwithstanding the stipulation at the end of the bond, an additional stamp does not appear to be necessary, because it is a modification of the terms on which the bond is given. Thus, in *Re Wansborough and Dyer*, 2 Chitt. 40, an objection was taken to the stamp on an arbitration bond, because, after all the usual clauses, a stipulation was inserted respecting the manner in which the costs should be paid. This was contended to be a substantive agreement, and required an agreement stamp, but the Court overruled the objection.

An agreement in a bond respecting incidental matter does not require an agreement stamp.

III. Contingent Post Obit, with Surety.

of 2,500*l.* to be paid to the said [*obligee*], his executors, administrators, or assigns, in the event of his, the said [*principal*] surviving his father [*father*], of &c., but not otherwise, at or for the price or sum of 1,000*l.*: AND WHEREAS, in pursuance of the said contract, the said [*obligee*] has paid the sum of 1,000*l.* unto the said [*principal*], the receipt whereof the said [*principal*] hereby acknowledges: AND WHEREAS upon the treaty for the purchase of the said contingent sum of 2,500*l.*, it was agreed that the payment thereof, in the event aforesaid, should be secured by the joint and several bond of the said [*principal*] and [*surety*] as the surety for the said [*principal*]. NOW THEREFORE THE CONDITION of the above-written obligation is such, that if the said [*principal*] shall survive the said [*father*]; and in such case, if the said [*principal*] and [*surety*], or either of them, or the heirs, executors, or administrators of them or of either of them, should pay or cause to be paid to the said [*obligee*], his executors, administrators, or assigns, within six calendar months next after the decease of the said [*father*], in the lifetime of the said [*principal*], the sum of 2,500*l.* sterling; or in case the said [*principal*] shall die in the lifetime of the said [*father*], then, &c.

Payment of purchase-money.

Agreement that contingent sum should be secured by bond.

Condition.

IV. *BOND from a* PRINCIPAL *and two* SURETIES *to* BANKERS, *to secure to a Banking Firm such Balance as may become due on Account current. Proviso, limiting the Amount to be recovered under the Bond.*

Obligation.

[*BOND jointly and severally, ut ante*, p. 345].

Recital of carrying on business:

WHEREAS the above-named [*obligees*] carry on the business of bankers in copartnership under the firm or style of ———: AND WHEREAS the above-bounden [*principal*] now carries on the business of [———]: AND WHEREAS the said [*principal*] has requested the said [*obligees*] to accept and discount notes, drafts, and bills of exchange, for him the said [*principal*]; and also to advance and lend him such sum and sums of money as he may require for his convenience and accommodation, in order to enable him to carry on the said business; and also to keep a cash or running account with him the said [*principal*]; which

that principal hath requested bankers to open an account with him:

IV. To Bankers, for Limited Current Balance.

they the said [*obligees*] have agreed to do, upon having such balance of the said cash or running account as shall or may at any time hereafter become due and owing from the said [*principal*], or any person or persons with whom he may hereafter enter into partnership, to them the said [*obligees*], or the persons or person for the time being carrying on the said business of bankers, now carried on under the firm of ——— as aforesaid, for or by reason or means of any drafts, notes, or bills of exchange, to be drawn or discounted upon, with, or by them the said [*obligees*], or such other persons or person as aforesaid; or for or by reason or means of any monies to be advanced on the said cash account; or by reason or means of any transaction, matter, or thing whatsoever, to be had between the said [*principal*] and the said [*obligees*], or such other persons or person as aforesaid, secured to be paid to them the said [*obligees*], their executors, administrators, and assigns, or such persons or person as aforesaid, by the joint and several bond of the said [*principal*], and of the said [*sureties*], as his sureties, in the penal sum of £———: So, nevertheless, that no greater sum be ultimately recoverable on the said bond; nor the said [*principal*], and [*sureties*], any or either of them, or the heirs, executors, or administrators of them, or of any or one of them, be liable to pay more by virtue thereof than the sum of £———. NOW THEREFORE THE CONDITION of the above-written bond is such, that if the above-bounden [*principal*] and [*sureties*], or any of them, or the heirs, executors, or administrators of them, or of any or one of them, should, from time to time, pay or cause to be paid unto the said [*obligees*], or any of them, or other the persons or person for the time being carrying on the said business of bankers now carried on under the firm of ———, or to the executors or administrators of them, or of any or one of them respectively, All such sum and sums of money as shall or may at any time be due and owing to the said [*obligees*], or any or one of them, or other the person or persons for the time being carrying on the business now carried on under the firm of ———, or to the executors or administrators of them, or of any of them, for or by reason of any drafts, notes, or bills of exchange, drawn or discounted upon, with, or by them the said [*obligees*], or any of them, or such other persons or person as aforesaid, or the executors or administrators of them, or of any or one of them, by, or for, or

which they have agreed to do, on having running balance secured by the bond of principal and sureties;

but the extent of the security to be limited.

Condition for payment of all such sums as shall be due to the firm for the time being,

IV. To Bankers, for Limited Current Balance.

on account of principal; or on his and his partner's account:

on account of, the said [*principal*], his executors or administrators; or by, for, or on account of the said [*principal*] and any other person or persons with whom he may enter into partnership, or be concerned in trade, or for money lent and advanced, paid or discharged by the said [*obligees*], or other such persons or person for the time being carrying on the said business of bankers now carried on under the said firm of ———, as aforesaid, or any of them, or the executors or administrators of them, or of any or one of them, to, for, or on the account, or for the use of the said [*principal*], his executors or administrators, or for him and any other person or persons with whom he may hereafter enter into partnership, or be concerned in trade, or in which he, his executors or administrators, or other the person or persons lastly aforesaid shall, by means of an account stated, or in any other manner whatsoever, become indebted to the said [*obligees*], or the persons or person for the time being carrying on the said business of bankers now carried on under the said firm of ———, or any of them, or the executors or administrators of them, or of any of them: AND should pay or cause to be paid to the persons or person entitled thereto, interest for such sum and sums of money as aforesaid, at and after the rate of 5 per cent. per annum, to be computed from the time or respective times of advancing, paying, or disbursing the same respectively, or of the same becoming due: AND ALSO the lawful and usual commission, charges, and expenses incident to or occasioned by the transactions aforesaid, or any of them, whether such payments, advancements, or disbursements, shall be by cash, notes, drafts, bills of exchange, or otherwise howsoever, or in whatever manner, or on whatever account the said debts shall become due, then the above-written bond or obligation shall be void and of no effect, otherwise the same shall be and remain in full force and virtue: PROVIDED ALWAYS, and it is hereby agreed and declared, that the sum of money to be ultimately recovered on this bond against either of them the said [*sureties*], or his heirs, executors, or administrators, shall be, and is hereby limited not to exceed the sum of £———: PROVIDED ALSO that, although as between the said [*principal*] and the said [*sureties*], the said [*sureties*] are only sureties for the said [*principal*], nevertheless, as between the said [*sureties*] and the said [*obligees*] respectively, the said [*sureties*] shall be taken to be principal debtors for all monies intended

with interest thereon,

and commission, &c.

Proviso limiting the amount of the money to be recovered under the bond.

Sureties to be liable as principals.

IV. To Bankers, for Limited Current Balance.

to be hereby secured, so that they shall not, nor shall either of them, nor the heirs, executors, or administrators of them, or either of them, be released from their, or his, liability, under the above-written bond, by reason of time being given to the said [*principal*], his heirs, executors, or administrators, or by the release of any collateral securities for the moneys intended to be hereby secured, or by any other forbearance, act, or omission of the said [*obligees*], or such other persons or person as aforesaid, or by any other matter or thing whereby the said [*sureties*], or either of them, or the heirs, executors, or administrators of them, or either of them, would be so released but for this provision.

V. *BOND from Two* Sureties *to* Merchants, *who have agreed to supply a Tradesman with Goods.*

[*BOND, joint and several*, ut ante, p. 345.]

Recital of agreement to supply a tradesman with goods, on sureties giving bond.

Whereas [*principal*], of &c., intends to carry on the trade or business of ———, at ——— aforesaid; and has requested the above-named [*obligees*] to supply him with goods in the way of his trade; which they have agreed to do, upon the said [*sureties*] entering into a bond in the penalty above-mentioned. NOW THE CONDITION of the above-written bond is such, that, if he the said [*principal*], his heirs, executors, or administrators, or some or one of them, should from time to time, and at all times hereafter, pay or cause to be paid to the said [*obligees*], their executors, administrators, or assigns, all such sums of money as shall at any time or times hereafter become due and owing to them the said [*obligees*] (*o*), from the said [*principal*], for goods which may at any time or times hereafter be sold by them (*o*) to the said [*principal*], and sent and delivered to, or to the order of the said [*principal*], as such sums shall respectively become due and payable; or in case the said [*principal*], his heirs, executors, or administrators should, at any time or times hereafter, make default in the payment of any such sum or sums, and the said [*sureties*], or one of them, or the heirs, executors

Condition making bond void on payment by principal;

or in case of his default, on payment by sureties, six months after notice of such sums not

(*o*) If it be intended to extend the security to sums to become due after an alteration in the firm, *vide ante*, pp. 306, *seq.*, and Precedent IV. *ante*.

Extension to new firm.

V. Sureties for Tradesman to a given Amount.

or administrators of them, or of one of them, should, within six calendar months next after notice of any such default, and of the sum then due, shall be given to, or be left at the respective dwellings of them the said [*sureties*], or of their respective heirs, executors, or administrators, by them the said [*obligees*], or any of them, or the executors or administrators of them, or any of them, pay or cause to be paid to the said [*obligees*], their executors or administrators, or assigns, all such sums of money as at the time of such notice shall be due and owing from the said [*principal*], his heirs, executors, or administrators, unto the said [*obligees*], their executors, administrators, or assigns, in case the same should not exceed the sum of £———; but if the same should exceed the sum of £———, then the sum of £———, in part of the sum or sums then due and owing, as last aforesaid; or if no such notice as aforesaid should be given or left as aforesaid; Then, in any of the said cases, the above-written bond or obligation shall be void; otherwise the same shall remain in full force.

exceeding £—— as shall be due; but if exceeding £——, then that sum;

or if no such notice shall be given.

VI. *BOND from a Legatee to an Executor, on Payment of the whole Legacy, or a Part,* TO REFUND, *if there should be a Deficiency of Assets.*

Obligation.

[*BOND, ut ante*, p. 345.]

Recital of a will bequeathing a legacy:

WHEREAS [*testator*], late of &c., deceased, by his will, dated &c., gave and bequeathed unto the said [*legatee*], the sum of £———, to be paid within six calendar months next after the said testator's decease; and appointed the said [*executor*], the executor of his said will: And the said testator died on or about the ——— day of ——— last past; and shortly after his decease the said [*executor*] duly proved the said will in the Principal Registry of the Probate Division of the High Court of Justice: AND WHEREAS (*p*) the said [*exe-*

death of testator, and proof of will:

that executor has not ascer-

(*p*) If only a part of the legacy be paid, say,

Part payment.

Recital that testator gave several other pecuniary legacies:

"AND WHEREAS the said [*testator*], by his said will, bequeathed several other pecuniary legacies, amounting, together with the said [*legacy*] given to the said [*legatee*] as aforesaid, to the full sum of £———: AND WHEREAS the

that the executor believes

VI. Legatee to refund on Deficiency of Assets.

cutor] has not yet ascertained the amount of the debts and credits of the said [*testator*], but, as he believes that the assets of the said [*testator*] will be sufficient to pay his debts, and the several legacies given by his said will, he the said [*executor*] has agreed to pay to the said [*legatee*] his said legacy of £———, on his entering into the above-written obligation, with such condition as is hereinafter contained. NOW THE CONDITION of the above-written bond is such, that, if the personal estate of the said [*testator*] deceased, should not prove sufficient to pay his debts and funeral and testamentary expenses, and the necessary charges of the said executorship (*q*), and all the pecuniary legacies given by the said will, then, if the said [*legatee*], his heirs, executors, or administrators, should, within fourteen days next after notice to him or them repay to the said [*executor*], his executors, administrators, or assigns, the said sum of £———, so paid to him as aforesaid, or so much thereof as shall appear to be in excess of the sum which shall be due to him, having regard to the

tained amount of debts and credits; but believing there will be enough to pay debts and legacies, has agreed to pay legacy on having bond.

Condition that, in case of deficiency of assets, if legatees should refund,

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said [*executor*] alleges that the personal estate of the said [*testator*] will not (as he believes), after payment of his debts, funeral and testamentary expenses, be sufficient to pay the whole of the said pecuniary legacies; and he is doubtful whether all the debts owing by the said [*testator*], at his death, are yet come to his knowledge; notwithstanding which he is willing to pay so much of the said legacies as the personal estate of the said [*testator*] come to his hands will extend to satisfy and pay, on being indemnified for so doing: AND WHEREAS the said [*executor*] has in his hands of the personal estate of the said [*testator*], sufficient to pay all the debts of the said testator yet come to his knowledge, his funeral expenses, and the necessary charges of the said executorship to the date hereof, and also a [fifth] part of the pecuniary legacies bequeathed by the said will: AND WHEREAS the said [*executor*] has, at the request of the said [*legatee*], and on his promise of indemnity for so doing, paid unto him the said [*legatee*] the sum of £———, being a [fifth] part of the sum of [*legacy*], given him by the said will as aforesaid."

testator's effects will be insufficient to pay the legacies: and is doubtful whether all his debts are come to executor's knowledge: but that he is willing to pay legacies so far as assets extend:

that, after payment of debts, &c., executor has assets to pay one-fifth of legacies;

that he has paid legatee one-fifth of his legacy, on his promise of indemnity.

(*q*) If only a part of the legacy be paid, say,

"and a [fifth] part of all the pecuniary legacies," &c.

VI. Legatee to refund on Deficiency of Assets.

amount of the assets of the said [*testator*], in respect of the said legacy of £———: And if the said [*legatee*], his heirs, executors, or administrators, should, from time to time, and at all times hereafter, keep indemnified the said [*executor*], his executors and administrators, and the estate of the said [*testator*] from all costs, charges, damages, and expenses which may happen, or come to him or them, or the estate of the said [*testator*], for or by reason of the said [*executor*] having paid the said [*legatee*] the said sum of £———, in (*r*) full, for the said legacy as aforesaid, or any matter or thing relating thereto; Then, the above-written bond to be void; otherwise the same to remain in full force.

and indemnify executor from all costs, &c., by reason of his having paid legacy,

then obligation to be void.

VII. *BOND for the faithful Service of a Clerk either to two Partners, or to them and their Executors or Administrators, and notwithstanding an Alteration in the Firm.*

Obligation.

[*BOND, joint and several, ut ante*, p. 345.]

Recital of having taken clerk.

Whereas the above-named [*partners*] have lately admitted the above-bound [*principal*] into their service, as their clerk, and have agreed to retain and continue him in their said service, on his obtaining two respectable persons to become sureties for his duly and faithfully accounting to them the said [*partners*] (*s*), in manner hereinafter mentioned, and

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(*r*) If only a part of the legacy be paid, say, "part of the said legacy," &c.

For faithful service after alteration in firm.

(*s*) The above form is adapted to the case where the sureties intend their guarantee should only extend to the faithful service of the clerk while he remains in the employ of the obligees. *Vide ante*, p. 303. But if it be intended that they should be guarantees for the faithful service of the clerk while he remains in the service of the obligees, as well as the survivor of them, or their executors or administrators, and notwithstanding new partners, then say,

"or either of them, or the survivor of them, their or his executors or administrators, and other the persons or person who shall or may become partners or partner with them, or with any of them, or one of them, or the executors or administrators of them, or any of them, in manner" &c.

To trustees of unincor-

If the clerk is to be employed in an unincorporated public

for his faithful and honest conduct during his (*t*) service: And the said [*sureties*] have, at the request of the said [*principal*], agreed to become such sureties, and have for that purpose executed the above-written bond. NOW THE CONDITION of the above-written bond is such, that, if the said [*principal*] should from time to time, and at all times, well and satisfactorily account for, and pay over and deliver to the said [*partners*] (*u*), their executors or administrators, all and every sums and sum of money, and securities for money, goods, and effects whatsoever, which he the said [*principal*] shall receive for the use of them, or of either (*x*) of them, or which shall at any time or times be intrusted to his care by them the said [*partners*] (*y*), or either of them, or by the correspondents or customers of them or of either of them, or others to whom they (*z*), or either of them, are, or is, or shall or may be liable or accountable: And do not at any

VII. Faithful Service of Clerk.

Agreement to become sureties.

Condition for faithful service of clerk:

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company, as the obligation should be made to trustees, after describing them, add,

porated public company.

"trustees for the society [*or* partnership] called the ——— company."

(*t*) If for faithful service, notwithstanding an alteration in the firm, say,

For faithful service after alteration in firm.

"continuance in the service either of the said [*partners*], or of either of them, or of the survivor of them, their or his executors or administrators, or other the persons or person who shall or may become partners or partner with them, or with any of them or one of them, or the executors or administrators of them or of any of them: And" &c.

(*u*) "or to either of them, or to the survivor of them, their or his executors or administrators, and other the persons or person who shall or may become partners or partner with them, or with any of them or one of them, or the executors or administrators of them or of any of them, all" &c.

(*x*) "any or one"

(*y*) "or either of them, or the survivor of them, their or his executors or administrators, or other the persons or person who shall or may become partners or partner with them, or with any of them or one of them, or the executors or administrators of them, or of any of them, or by the correspondents or customers of them, or of any of them," &c.

(*z*) "they, or any of them," &c.

VII. Faithful Service of Clerk.

and that he shall not embezzle, &c.

time embezzle, make away with, obliterate, deface, or in any wise injure any of the money, securities for money, books, papers, writings, goods, or effects of them the said [*partners*] (*a*), or either of them, or of the correspondents or customers of them, or of either of them, or others to whom they or either of them are, or is, or shall or may be or become liable or accountable (*b*): Then, and in such case, the above-written bond to be void, and of no effect; otherwise to remain in full force.

Proviso, that sureties shall only be liable to a given amount.

PROVIDED ALWAYS, and it is hereby declared, that the said [*sureties*], or their respective heirs, executors, or administrators are not separately, or individually, to be liable for more than 1,000*l.* each, parcel of the said sum of 2,000*l.* mentioned in the said above-written bond or obligation.

VIII. *BOND with Sureties for the* FAITHFUL SERVICE *of a* CLERK *in the Employment of a* PUBLIC COMPANY.

Obligation.

[*BOND, joint and several, ut ante*, p. 345.]

Recital of choice, and admission as clerk of a company.

WHEREAS the said [*clerk*] has been chosen a clerk in the said ——— Company; and the said [*sureties*] have agreed to enter into the above obligation, as sureties for the fidelity of the said [*clerk*], while in the service of the said Company:

Condition for clerk's faithful service:

NOW THE CONDITION of the above-written bond is such, that, if the said [*clerk*] should from time to time, and at all times hereafter, during his continuance in the service of the said Company, faithfully, honestly, diligently, and carefully execute, perform, and discharge the said service, and all

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For faithful service after alteration in firm.

(*a*) "or either of them, or the survivor of them, their or his executors or administrators, or other the persons or person who shall or may become partners or partner with them, or with any of them or one of them, or the executors or administrators of them, or of any of them, or of the correspondents or customers of them, or of any of them, or others to whom they, or any of them, are," &c.

(*b*) Add indemnity clause, as in next precedent, if it be the intention of the parties.

and every other services of the said Company, wherein he is, shall, or may be employed; And shall, if and whenever he shall be so required, give and deliver, in writing, a just and true account of all moneys, notes, bills, securities for money, goods and effects whatsoever, which in the said service shall come to the hands of the said [*clerk*], or which he shall be entrusted with, by, or on account of the said Company: And also make good, answer for, and pay the moneys due on the balance of such account to the said Company, or such persons as the said Company, or the directors thereof for the time being, shall appoint: And should, moreover, well and sufficiently save harmless, and keep indemnified, the said Company, and the directors and all other members thereof, from and against all losses, costs, charges, damages, and expenses, which shall or may happen or come to them, for or by reason of any act, deed, matter, or thing whatsoever, done or omitted to be done by the said [*clerk*], in or during his said service: Then this bond to be void, &c.

VIII. Faithful Service of Clerk to Public Company.

that he on request shall deliver just accounts:

and pay the balance thereof;

and to indemnify the company from all losses.

IX. *BOND to secure the Fidelity of Bankers' Chief Clerk.*

[*BOND, joint and several, ut ante*, p. 345.]

Obligation.

WHEREAS the said [*obligees*] now carry on the business of bankers at ——— aforesaid, under the firm of ——— & Co.; and they have agreed to take the said [*clerk*], as their head or managing clerk in the said business, on having the security of the above-written bond for his good conduct: NOW THEREFORE THE CONDITION of the above-written bond is such that if the said [*clerk*] should, from time to time, while he shall continue in the service of the said [*obligees*] (*c*), as the head or managing clerk in their said banking-house, diligently and faithfully serve them, and devote the whole of his time and attention to their business; and give such reason-

Recital of being bankers, and agreement to take principal as chief clerk, on having bond.

Condition for faithful service:

(*c*) According to this form, in case of the death of any of the partners, or any of them going out of the partnership, or a new partner taken in, a fresh bond must be taken. If it is desired to obviate this, the variations, *ante*, p. 356 (*s*), should be adopted. *Vide ante*, p. 303.

IX. Fidelity of Bankers' Chief Clerk.

for keeping bankers' secrets, and for informing them of all letters, &c.; for keeping all cash accounts, &c., and for answering letters; for rendering to bankers cash, &c.; for not embezzling bankers' property; for receiving customers with civility; for causing inferior clerks to give due attendance; and for conducting himself in all other respects diligently.

able attendance at their banking-house at ——— aforesaid, as they shall from time to time require: And should keep all their secrets, and inform them, and every of them, of all such letters, writings, papers, and occurrences whatsoever, as shall from time to time come to his knowledge respecting the said business: And should keep all the cash accounts, ledgers, books, deeds, writings, and papers, belonging or relating to the said business, in a proper and orderly manner; and regularly answer the letters of their correspondents: And should account for, and render to the said [*obligees*], and every of them, all such cash, bills, notes, and other securities, as shall from time to time come, or without his wilful default might have come, to his hands: And should not embezzle, conceal, or waste, nor (as far as in him shall lie) permit to be embezzled, concealed, or wasted by others, any of the property belonging to the said [*obligees*], or any of them: And should receive all the customers of the said banking-house with civility; and make up the notes or memorandums of their respective affairs when necessary: And should (as far as in him shall lie) cause the inferior clerks of the said [*obligees*] to give due attendance at the said banking-house, and there to conduct themselves diligently and faithfully, and in an orderly manner: And also if the said [*clerk*] should, in all other respects, diligently, skilfully, and faithfully conduct himself as the head or managing clerk of the said [*obligees*], in their said banking-house: Then the above-written bond shall be void, but otherwise shall remain in force.

X. *BOND from the* Treasurer *of an* Assurance Society *to the Trustees, for due Performance of his Duties.*

[*BOND from Treasurer to the Trustees, describing each, ut ante*, p. 345 (*b*), (*c*).]

Obligation from one to several as joint-tenants.

Recital.

Condition to apply sums received as treasurer, according to the rules of the Society:

Whereas the above-bounden [*treasurer*] has lately been appointed to, and now holds the office of treasurer of the above-named Society. NOW THE CONDITION of the above-written obligation is such, that if the said [*treasurer*], so long as he shall hold the office aforesaid, should duly and regularly account for, and from time to time pay and apply all such

X. From Treasurer of Assurance Society.

sums of money as shall be received by him as such treasurer as aforesaid, or which shall in anywise come into his hands on account of the said Society, in manner prescribed by [the said deed (*d*), and by] such rules, orders, and regulations, as have been or shall or may hereafter be made by the court of directors of the aforesaid ——— Assurance Society for the time being, or the major part of them, when assembled at any of their general or extra meetings, held pursuant to the rules and regulations of the said Society: And should also, at all times hereafter, when ordered, or required by the said court of directors of the said Society for the time being, or the major part of them, assembled as aforesaid [*here insert any special conditions which may be required*]; And should, from time to time and at all times hereafter, well and truly observe, perform, fulfil, and keep, all and singular the rules and regulations of the said Society [mentioned and contained in the said deed (*d*), so far as the same remain unaltered; And all other rules, orders, and regulations which have since been made, or which may from time to time hereafter be made by the same Society, and] which it is, or shall or may be, incumbent upon him to observe, perform, fulfil, and keep, as treasurer of the said Society; Then, &c.

and to perform all the regulations of the society, which he ought to perform as treasurer.

XI. *BOND for the* PERFORMANCE *of an* AGREEMENT.

[*BOND, ut ante*, p. 345.]

Obligation.

THE CONDITION of the above-written bond is such, that, if the above-bounden [*obligor*], his executors and administrators, should, in all things, on his and their parts, observe, perform, fulfil, and keep all and singular the clauses, conditions, agreements, matters, and things, which on the part of the said [*obligor*], his executors or administrators, are to be observed, performed, fulfilled, and kept, according to an agreement in writing, bearing even date herewith [*or* dated the ——— day of ———, 18—], and expressed to be made between the said [*obligor*], of the one part, and the said [*obligee*], of the other part; Then the above-written obligation shall be void; but otherwise shall remain in full force.

Condition for performance of a specified agreement.

(*d*) *I.e.* the deed of incorporation of the Society which, if the Society is so incorporated, will have been mentioned in the body of the bond.

XII. *BOND from Builders, and their Sureties, for the due Performance of a Contract for* BUILDING A SCHOOL, *and altering and repairing a House.*

Obligation to a trustee for the managers of parish schools, from two principals, jointly and severally, with a separate lien part from two sureties severally, in an additional penalty.

KNOW ALL MEN BY THESE PRESENTS, That we [*builders*], both of &c., are jointly and severally bound to [*trustees*], of &c. (the trustees nominated by and on behalf of the managers of the schools of the parish of ———, in the county of ———), in the penal sum of £———: AND that we [*sureties*], of &c. (as the sureties for the said [*builders*], their executors and administrators), are severally and respectively bound to the said [*trustees*], in the penal sums of £———: ALL the said several sums to be paid to the said [*trustees*], or their certain attorney or attorneys, executors, administrators, or assigns. FOR which payment to be made by us the said [*builders*], We the said [*builders*], bind ourselves, jointly and severally; And for which several payments to be well and truly made by us, the said [*sureties*], respectively, We the said [*sureties*], respectively, bind ourselves respectively by these presents; Sealed with our seals: Dated the ——— day of ———, 18—.

Recital of contract to erect schools, &c.;

WHEREAS the above-bounden [*builders*], have lately entered into a contract, in writing, with the managers of the schools of the parish of ——— aforesaid, whereby they have contracted with the said managers to do the whole of the works, in erecting and completely finishing the buildings of an intended new school, with the outbuildings, staircases, &c., attached thereto; and to make alterations and reparations in the present house in ——— Street, belonging to the said managers, in every respect agreeably to the drawings, agreements, conditions, clauses, and particulars mentioned, specified, particularized, and contained, in a certain paper or writing, intituled, "[*title of paper*]," for the sum of £———: AND

and agreement that principals and sureties should give bond for due performance of contract.

WHEREAS, at the time of entering into such agreement as aforesaid, by the said [*builders*], the said [*sureties*], as their sureties, agreed to execute the above-written bond for the due performance of the several works so contracted to be done as aforesaid, according to the specification aforesaid. NOW THEREFORE THE CONDITION of the above-written bond is such, that, if the above-bounden [*builders*], or either of them, or the

Condition for due performance of contract.

XII. With Two Sureties, to perform Contract for Building, &c.

heirs, executors, or administrators of them or either of them, should observe and perform all the stipulations and provisions in the said contract mentioned, and on their or his parts or part to be observed and performed, and should within ——— calendar months from the date of the above-written bond or obligation, execute, and completely finish, or cause to be executed, and completely finished, all and singular the several erections, buildings, alterations, repairs, and other works particularized in the hereinbefore-mentioned specification, conformably to the same specification in all respects whatsoever, and in a good and workmanlike manner, to the satisfaction of the architect, for the time being, of the said managers: But, so that no variation in the terms of the said contract, nor extension of time given to the said [*builders*], or either of them, or the executors or administrators of them or either of them, beyond the original or enlarged time provided in the said contract for completing the said works, or performing any of the stipulations therein contained, nor any other delay or forbearance on the part of the said [*trustees*], or of the said managers, or their architect, for the time being, shall in any way release the said [*sureties*], or either of them, or the heirs, executors, or administrators of them or either of them, from their or his liability, under the above-written bond: Then the above-written bond, &c.

XIII. *BOND* (*e*), *from Builders and Sureties, for due Performance of Contract.* (*Concise Form.*)

Obligation.

[*BOND, ut ante*, p. 362.]

WHEREAS the above-bounden [*builders*], have contracted with [*trustees or building committee*], to build a church at ———, for the sum of £———, by a contract dated the ——— day of ———, 18—. NOW THE CONDITION of the above-written bond is such, that, if the said builders shall duly perform the said contract; Then, &c.

(*e*) This precedent is taken, by permission, from Sir E. Beckett's Book on Building. For precedents of building contracts, see *ante*, tit. AGREEMENTS, vol. I., pp. 539, 543, 548.

XIV. *BOND from a Vendor to a Purchaser, for* QUIET ENJOYMENT *of* FREEHOLD *and* LEASEHOLD *Property, or a Return of the Purchase Money in case of Eviction.*

Obligation

[*BOND, ut ante*, p. 345.]

Recitals.

WHEREAS, by an indenture of even date with these presents, and made between [*parties*]; All those, &c. [*parcels*], were for the consideration therein mentioned, conveyed, as to such of the same premises as are of freehold tenure, unto and to the use of the said [*purchaser*] in fee simple, and as to such of the same premises as are of leasehold tenure unto the said [*purchaser*] absolutely for the unexpired residue of a term of 99 years, from the ——— day of ———, 18—, as in the indenture now in recital is mentioned: AND WHEREAS, upon the treaty for the purchase of the said premises, it was agreed that the said [*vendor*] should enter into a bond in a penalty of £———, for securing to the said [*vendor*] the quiet enjoyment thereof, in manner herein appearing. NOW THE CONDITION of the above-written bond is such, that, if the said [*purchaser*], his heirs, executors, administrators, and assigns, should, according to the different natures and tenures of the said messuage, or tenement and premises so purchased by him, the said [*purchaser*], as aforesaid, from time to time and at all times for ever hereafter in respect of the freehold parts thereof, and during the continuance of the said term in respect of the said leasehold parts thereof, peaceably and quietly hold, occupy, and enjoy all and singular the freehold and leasehold hereditaments and premises so purchased by him as aforesaid, without any let, suit, claim, eviction, interruption, or disturbance whatsoever, of, from, or by the said E. F., or any person or persons claiming by, from, through, or under, or in trust for him, his ancestors or testators: or, if the said [*purchaser*], his heirs, executors, administrators, or assigns, shall be evicted from, or be dispossessed of, the said premises, or any part thereof, either for the whole, or any part of the estate or interest, so purchased by him as aforesaid, by reason or means or in consequence of any ejectment or ejectments, action or actions, or other proceeding or proceedings, claim or demand, claims or demands, whatsoever, at any time or times hereafter to be brought, commenced, prosecuted, made, or set up by the said E. F., or by any person or persons claiming

Condition, if purchaser, &c. peaceably enjoy;

rents, without any interruption from certain persons;

or if purchaser, &c., should be evicted;

by, from, through, under, or in trust for him, or his ancestors or testators; Then, if the said [*vendor*], his heirs, executors, administrators, or assigns, should, upon demand, and upon a conveyance being made by the said [*purchaser*], his heirs, executors, administrators, and assigns, unto the said [*vendor*], his heirs, executors, administrators, and assigns, or as he or they shall direct, of so much, and such part and parts, if any, of the said freehold and leasehold premises, as shall then remain vested in the said [*purchaser*], his heirs, executors, administrators or assigns, after such eviction as aforesaid; or of or from which he or they shall not be evicted or dispossessed as aforesaid, free from all charges and incumbrances (the expenses of such conveyance to be paid by the said [*vendor*], his heirs, executors or administrators), pay or cause to be paid, unto the said [*purchaser*], his executors, administrators, or assigns, the said sum of £———, so paid by him for the purchase aforesaid; and all costs, charges, and expenses, which shall be incurred by him or them, in defending any such action or suit, actions or suits, as aforesaid: Then, &c.

XIV. For Quiet Enjoyment; or Return of Purchase-money, if Evicted.

then if vendor, his heirs, &c., should, on demand and reconveyance of residue (if any) of premises, free from incumbrances, repay purchase-money and costs;

bond to be void.

XV. *BOND for quiet Enjoyment, where the Title commenced at too late a Period.*

[*BOND, ut ante*, p. 345.]

Obligation.

WHEREAS [*recite conveyance, ut ante*, p. 364]: AND WHEREAS the title of the said hereditaments originally produced by the said [*vendor*] to the said [*purchaser*], commenced with an indenture dated the ——— day of ———, 18—, purporting to be a conveyance in fee simple of the said premises to T. B.: AND WHEREAS an objection was made, on the part of the said [*purchaser*] to the title of the said [*vendor*] to the said premises, because it commenced at too recent a period; And the said [*vendor*] not being able to produce satisfactory evidence of the early title, it was agreed that, in addition to the ordinary covenants for title implied in the said indenture of even date with these presents, the said [*vendor*] should give to the said [*purchaser*] his bond, with such condition as is hereinafter contained. NOW THE CONDITION of the above-written bond is such, that, if the here-

Recital of conveyance to purchaser;

of commencement of title;

objection that vendor, not being able to produce earlier title, offered to give this bond.

Condition, if premises conveyed should

XV. For Quiet Enjoyment; where Title was too Recent.

ditaments, comprised in and intended to be conveyed, by the said indenture of even date with these presents, with the appurtenances, shall henceforth go and remain to the use of the said [*purchaser*], in fee simple, and be peaceably and quietly entered into and upon, and held, occupied, possessed, and enjoyed, and the rents, issues, and profits thereof, and of every part thereof, had, received, and taken accordingly, without the lawful let, suit, eviction, interruption, claim, or demand whatsoever, of or by any person or persons whomsoever: Then, &c.

remain to the uses declared in the release;

and be peaceably enjoyed; and the rents received;

bond to be void.

XVI. *BOND to* RESIGN *a* RECTORY *upon Request, after either of the Patron's two Sons is competent to take it* (*f*).

Obligation from one to one.

[*BOND from* [*parson*], of &c., clerk; *to patron, of &c., in double the value of the living for the parson's life, ut ante*, p. 345.]

Recital that rectory was vacant by death of last incumbent;

and that patron had presented obligee;

that patron has two sons, and parson has agreed to resign upon request.

WHEREAS the rectory of the church of B., within the county of [*Norfolk*] and diocese of [*Norwich*], is now vacant by the death of [*last rector*], clerk, the last incumbent there; and the above-named [*patron*], being the patron of the said rectory and church, is about to present the above-bound [*parson*] to the said rectory and church of B.: AND WHEREAS the said [*patron*] has two sons, A. B. and C. D., who are infants, and the said [*parson*] has agreed to resign the said living or rectory, upon the request of the said [*patron*], or the patron of the said rectory for the time being, in order that one or other of the said sons of the said [*patron*] (being of sufficient age, and having taken holy orders), may be presented thereto. NOW THE CONDITION of the above-written obligation is such, that, if the said [*parson*] should be duly and actually admitted, instituted, and inducted into the said rectory and church of B., by virtue of and under the presentation of the said [*patron*]: and also if either of the said sons of the said [*patron*] should live to take holy orders, and in that event the said [*parson*] should, within six months after request in writing to him made by the said [*patron*],

Condition, if obligor should be inducted under the presentation;

and if either of the two sons of patron should live to take orders,

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(*f*) As to resignation bonds, see stat. 9 Geo. 4, c. 94, stated *ante*, p. 311, *seq.*

or the owner for the time being of the advowson of the said rectory, at any time whilst such son shall be qualified to hold the said rectory, effectually make void the admittance, institution, and induction of him the said [*parson*] into the said rectory and church, by making a full and absolute legal resignation and renunciation of the same to the bishop of the diocese for the time being; and by procuring the said bishop to accept such resignation; so that the said [*patron*], or the patron or patrons for the time being of the advowson of the said rectory and church, may present to the same such son of the said [*patron*] as shall take orders as aforesaid, free from the title, and all claims and demands of the said [*parson*] therein: or, in case neither of the said sons of the said [*patron*] should become qualified to hold the said rectory during the life of the said [*parson*]; or, if no such request in writing as aforesaid shall be made to the said parson to resign the said rectory: Then, &c.

XVI. To resign Rectory in Favour of One of Patron's Two Sons, when he is Competent.

and the obligee should, upon request, resign the rectory,

and procure the bishop to accept such resignation;

or in case no such son should take orders in obligee's life; or no request be made, then bond to be void.

XVII. *BOND* NOT TO CARRY ON BUSINESS *within Half a Mile for a certain Number of Years, nor to solicit Custom of Persons mentioned in a Schedule.*

KNOW ALL MEN, &c. [*ut ante*, p. 345.]

Obligation.

WHEREAS the above-bound [*obligor*] and the above-named [*obligee*] have lately carried on the business of ———, in partnership, at ——— aforesaid: AND WHEREAS the said [*obligor*] and [*obligee*] have dissolved the said partnership; And the said [*obligor*], in consideration of the sum of £—— paid to him by the said [*obligee*], has assigned to the said [*obligee*] All his the said [*obligor's*] share and interest in the stock in trade and effects of the said partnership; and has agreed that he will not, either alone or in partnership with any person whomsoever, carry on the said business of a ———, within the distance of half a mile of the said house at———, during the term of ——— years, to be computed from the day of the date of the above-written bond; And that he will not, within the said term of ——— years, solicit the custom, either for himself or any person whomsoever, of any of the persons whose names are mentioned or specified in the

Recital of co-partnership;

dissolution;

assignment of retiring partner's share;

and agreement by retiring partner not to carry on business within half a mile;

nor solicit custom of persons mentioned in schedule;

XVII. Not to carry on Business.

schedule hereunder written; or, otherwise that he will pay the sum of £——— to the said [*obligee*], as liquidated damages. NOW THE CONDITION of the above-written bond is such, that, if the said [*obligor*] should, either alone or in partnership with any person or persons whomsoever, carry on the said trade or business of ———, or any branch thereof, within the distance of half a mile in any direction of the said house at ———, at any time within the space of ——— years to be computed from the day of the date of the above-written bond; or if the said [*obligor*], either by himself or by any other person whomsoever, should at any time within the said space of ——— years solicit the custom of any of the persons whose names are specified in the schedule or inventory hereunder written, to deal either with himself, the said [*obligor*], or with any other person whomsoever in the said trade or business of ———, or any of them; or induce or prevail upon, or attempt to induce or prevail upon any of the said persons whose names are mentioned in the said schedule not to deal, or to discontinue his, her, or their dealing with the said [*obligee*]; Then, and in either of the said cases, if the said [*obligor*], his heirs, executors, or administrators, should forthwith pay to the said [*obligee*], his executors, administrators, or assigns, the full sum of £———, without making any deduction or abatement thereout whatsoever; the said bond or obligation shall be void and of no effect; otherwise shall be and remain in full force and virtue.

and in case he should, to pay liquidated damages.

Condition that obligor shall not carry on business within half a mile;

nor solicit custom of any of the persons mentioned in the schedule;

or attempt to induce any of the same persons not to deal with obligee;

under pain of paying liquidated damages.

Schedule.

THE SCHEDULE ABOVE REFERRED TO.

COMPOSITION.

PRELIMINARY DISSERTATION.

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I. Of Compositions Generally.

Origin of composition.

In order to avoid the expense and inconvenience incident to the administration of the affairs of an insolvent debtor in bankruptcy, the practice grew up

Of Compositions generally.

in very early times for debtors to call together meetings of their creditors, with the view of inducing them to grant some rebate upon the full amount due to them, or some concession in point of time for payment of their claims, or some other indulgence, so as to facilitate a settlement with as little delay and trouble to the creditors as possible, and without absolutely ruining the debtor, and breaking up his business.

Compositions at Common Law.

The arrangements so arrived at are called compositions, and the terms of such arrangements are generally embodied in instruments which are called composition deeds. At Common Law, the consent of each individual creditor is required to the alteration of the original contract between himself and the debtor, or to the waiver of part of his claim, and consequently compositions, apart from statutory enactment, are binding only on such of the creditors as assent thereto by executing the deed of arrangement or otherwise (*a*), and do not in any way affect a dissentient minority of creditors, or any one individual creditor whose assent to the arrangement cannot be obtained. But the policy, which from the earliest times (*b*) has recognised the wisdom of relieving a debtor who has become too deeply involved, has induced our Legislature from time to time to pass enactments, giving to a majority of creditors, under specified conditions, the statutory power to enter into compositions with their debtor, which will be binding upon the dissentient minority. Compositions, independent of the Bankruptcy Laws are, however, still not unfrequently entered into, and are likely, for reasons which will presently be stated, to become more common than heretofore. Precedents of deeds embodying terms of arrangement in such cases will be found in the following pages; but it is obvious that such instruments are subject to no general rules, and must be varied according

(*a*) As to the necessity of a deed for the purpose of an arrangement that creditors shall accept a less amount than is due to them, see *post*, p. 520.

(*b*) The Jubilee among the Jews, the σεισάχθεια at Athens, and the *novæ tabulæ* at Rome are familiar instances of the policy referred to.

Of Compositions generally.

to the requirements of each particular case. Recourse may well be had to deeds of this description, where all the creditors whose claims would support an adjudication in bankruptcy can be induced to concur; but otherwise the composition is liable to be impeached, and its object defeated. In the first place, the conveyance or assignment by a debtor of all his property, or of all his property with a colourable exception, for the benefit of his creditors generally, is in itself an act of bankruptcy, on which any dissenting creditor may present a petition and so force the winding up of the estate into bankruptcy: see *Ex parte Dixon*, 13 Q. B. D. 118. Again, every conveyance, charge or payment made or obligation incurred by an insolvent debtor, with a view of giving preference to particular creditors, is liable to be avoided except as against purchasers in good faith for valuable consideration from the creditors, and constitutes an act of bankruptcy. And even if the composition deed contains no such conveyance or assignment, it may be doubted whether a debtor would not be committing an act of bankruptcy by impliedly giving notice to his creditors that he has suspended, or is about to suspend, payment of his debts. See as to what will amount to such notice, *post*, p. 431.

Acts of bankruptcy not available after three months.

No act of bankruptcy, however, is available under the Bankruptcy Act of 1883, as a ground for a bankruptcy petition, unless such petition is presented within three months after the act has been committed; so that a Common Law composition, after three months have elapsed since the date of its acceptance, if no bankruptcy petition is presented in the meantime, will become binding on all those who have signed or assented to it, and will be unimpeachable except on the ground of actual fraud. The period during which a person was liable to become bankrupt by reason of an act of bankruptcy, which was formerly twelve months after the commission of the act, was limited by the Bankruptcy Act of 1869 (now repealed) to six months, and has been further reduced to three months by the Act of 1883; this reduction will, no

Of Compositions generally.

doubt, considerably facilitate and multiply arrangements such as are now being considered (*b*).

It must, however, further be borne in mind that, as has been already observed, a Common Law composition is binding only on those who assent to it, so that any creditors, or single creditor, may stand out against it, and retain the right to be paid in full; see *Carey* v. *Barrett*, 4 C. P. D. 379; and any dissentient (*c*), if his claim is such as to support a bankruptcy petition, will be entitled, unless paid in full, to take proceedings in bankruptcy, and so altogether defeat the objects of the arrangement: *Ex parte Dixon*, 13 Q. B. D. 118.

Common Law compositions not binding on dissentients.

What is sufficient assent.

It is evident that, in the case of deeds not intended to operate under the provisions of the Bankruptcy Law, and consequently not binding on non-assenting creditors, it is important that the assent of all the creditors, whose claims would entitle them to present a bankruptcy petition against the debtor, shall if possible be obtained. With regard to instruments of this description, the question has frequently arisen as to what constitutes a sufficient assent on the part of a creditor, so as to render the deed binding upon him, and to entitle him to claim the benefit of it. It has long been settled that actual execution of the deed by a creditor is not necessary for this purpose, and this rule holds good even though a time may have been limited within which the deed is to be executed, and such time may have expired: *Smith* v. *Wheeler*, 1 Ventr. 128; *Ex parte Sadler*, 15 Ves. 52; *Ex parte Cawkwell*, 19 Ves. 233; *Ex parte Shaw*, 1 Mod. 598; *Whitmore* v. *Turquand*, 3 De G., F. & J. 107. This rule is an application to the case of deeds providing for distribution of the assets of a debtor, on principles analogous to those followed in bankruptcy, of the ordinary rule as to the time within which creditors are entitled to come in and prove in bankruptcy; as to which see *Ex parte Boddam*, 2 De G., F. & J. 625, and see *post*, p. 463. A creditor will not be deemed to have assented to the deed if he does not comply with the express terms of the deed;

(*b*) It would appear that the enactment referred to has already produced this result in practice to a very considerable extent.

(*c*) So also a creditor privy to the deed, if it is fraudulent as against him: *Ex parte Marshall*, 1 M., D. & De G. 575.

Bush v. *Shipman*, 14 Ves. 239; or if he unreasonably delays making his claim under it: *Gould* v. *Robertson*, 4 De G. & Sm. 509; *Lane* v. *Husband*, 14 Sim. 656. So also, if he expressly refuses to assent, and does not retract such refusal before the time fixed for execution of the deed; *Johnson* v. *Kershaw*, 1 De G. & Sm. 260; or if he sets up a title adverse to the deed; *Watson* v. *Wright*, 19 Beav. 369; or even if he purposely stands by, and abstains from taking any steps in the matter: *Brandling* v. *Plummer*, 27 L. J. (N. S.) Ch. 188; *Biron* v. *Mount*, 24 Beav. 642. There must, in fact, be some overt act done by the creditor denoting his willingness to come in under the deed to constitute accession: *Whitmore* v. *Turquand*, 3 De G., F. & J. 107. The rule is thus stated by Lord *Cranworth*, C.:—"No person can be considered to have impliedly acceded to a deed of this sort within the true meaning of that expression who has not put himself in precisely the same situation with regard to the debtors as if he had executed it; the principle of the rule being that if you put yourself in the situation of having the benefit of a deed, you must bear its obligations, although you have not literally executed the deed:" *Forbes* v. *Dimond*, 4 De G., M. & G. at p. 315. See also *Re Marshall*, De G. 273; *Biron* v. *Mount*, 24 Beav. 642. The Court has permitted a creditor to come in after the specified time, and share in future dividends, on the terms of not disturbing dividends already made: *Broadbent* v. *Thornton*, 4 De G. & Sm. 65. But where a deed provided for a composition to all creditors who should before a fixed day *execute a release* to the debtor of their claims, it was held that a creditor who had allowed the day to pass without executing the release was not entitled to an extension of time, or to come in under the composition: *Emmet* v. *Dewhurst*, 3 Mac. & G. 587.

A composition deed may give to the trustees a discretion to grant or refuse the benefit of it to any creditor, and in that case the Court will not interfere with that discretion, so as to compel the admission of a creditor: *Wain* v. *Earl of Egmont*, 3 My. & K. 445; *Drewer* v. *Mawdesley*, 16 Sim. 511. It is of course open to the excluded creditor to seek to

Of Compositions generally.

invalidate the deed on any ground available for that purpose.

In order to render an instrument of this description unimpeachable, it is necessary, unless the assent of every one of the creditors can be obtained, that it should not fall under either of the two following categories of transactions constituting acts of bankruptcy under the Act of 1883: *i. e.*, that it should not be either (i) an assignment of the whole or of virtually the whole of the debtor's property for the benefit of his creditors generally, or in other words, of *all* his creditors; nor (ii) an assignment of the debtor's property for the benefit of particular creditors to the exclusion of the rest, except so that a sufficient part of the debtor's property be left unassigned to meet the claims of creditors not parties to the assignment. It is not often found in practice that one class of creditors will readily accept a partial payment in satisfaction of their claims, while there is another class whose claims must be fully satisfied, or otherwise the attainment of the object of the arrangement is liable to be defeated, and the estate thrown into bankruptcy. And where a debtor is in a position to pay all his creditors in full, and also to retain sufficient property to enable him to maintain himself and family, and to preserve his business or credit (which from the point of view of the debtor is the main motive for an arrangement), he will, unless exceptionally unfortunate, be able to obtain accommodation as regards raising money, or indulgence in point of time or otherwise, without being compelled to execute an absolute assignment of his property for the benefit of his creditors. He will usually be able to obtain a loan, or to effect a settlement by an ordinary composition by instalments or by setting apart a portion of his income to form a sinking fund, as to which see *post*, Precedent X., p. 532.

Under the present Bankruptcy Act, which follows the principle of former legislation in this respect, the conveyance or assignment by a debtor of his property to trustees for the benefit of creditors *generally*, constitutes an act of bankruptcy, on which a bankruptcy petition may be presented by a dis-

Of Compositions generally.

sentient creditor at any time within three months after the conveyance or assignment (*d*). By "the property" of the debtor would seem to be meant the whole property, or the whole with merely a colourable or inconsiderable exception; and, where the transaction is in other respects entered into *bonâ fide*, the true principle of distinction is whether the exception is sufficient to prevent the debtor from becoming virtually insolvent; *Smith* v. *Cannan*, 2 E. & B. 35; *Ex parte Hawker*, L. R., 7 Ch. A. 214; *Ex parte Field*, 13 Ch. D. 106, n.; or, in the case of a trader, whether or not the exception is sufficient to enable him to carry on his trade or business as hitherto: *Ex parte Bailey*, 3 De G., M. & G. 534; *Ex parte Taylor*, 5 De G., M. & G. 392; *Staner* v. *Williams*, 19 Beav. 626; *Ex parte Foxley*, *In re Nurse*, L. R., 3 Ch. A. 515; *Jones* v. *Harber*, L. R., 6 Q. B. 77. This question will be more fully considered later, see *post*, p. 384, n. (*d*). As to fraudulent preference, see *post*, p. 451.

Form of such deeds.

Form of Deeds of Arrangement and Composition.]— No general rule can be laid down as to the mode of framing instruments embodying terms of arrangement between debtors and creditors, and intended to operate independently of statutory enactment. It is found, however, by experience, that it is in most cases advisable to follow more or less closely, in arrangements of this kind, the principles and mode of administration and distribution of the debtor's property which are adopted in the case of compositions and schemes of arrangement entered into and conducted under the law of bankruptcy. The assent of creditors will be the more readily given where the proposed arrangement, on the one hand, deprives no creditor of any advantage which he could obtain if the property were administered under a statutory composition or scheme, so far as relates to establishing his claim and sharing in the assets; while, on the other hand, it holds out a prospect of a speedy and easy settlement of the debtor's affairs, without the delays, trouble and expense

(*d*) See as to the position of a trustee of such a deed after it has been set aside, *Ex parte Chaplin*, *Re Sinclair*, 26 Ch. D. 319; *Re Richards*, 32 W. R. 1001.

Of Compositions generally.

usually incident to proceedings conducted under official supervision and control.

Different kinds of creditors' deeds.

Most deeds of arrangement between debtors and creditors, whether intended to take effect under or independently of the Bankruptcy Laws, belong to one or other of the following classes: (i) Conveyances or assignments for the benefit of creditors; (ii) Composition deeds; (iii) Letters of license; and (iv) Inspectorship deeds. The same instrument may, however, contain clauses which will make it fall within two or more of these categories.

Assignments for benefit of creditors.

(i) A conveyance or assignment of a debtor's property upon trusts for the benefit of his creditors is, in most respects, similar to an ordinary conveyance or assignment in trust for sale, but the creditors, and sometimes a committee of inspection, are made parties to the instrument. The trusts for the benefit of the creditors are according to the nature of the property declared either by the deed of conveyance or assignment itself, or by a separate instrument. See *post*, p. 504, n. (*a*). These trusts are either for the distribution of the whole proceeds of the sale, after payment of expenses, rateably among the creditors in or towards satisfaction of their debts, according to the practice in bankruptcy, or for the payment out of such proceeds to the creditors of a composition of an amount named in the trust-deed, in full satisfaction of their debts. Instruments of this description usually contain, and are expressed to be entered into by the debtor in consideration of, a release by the creditors of all their claims against the debtor.

Composition deeds.

(ii) A composition deed, strictly so-called, is a deed in which the debtor covenants with his creditors to pay to them a stipulated composition dividend upon the amount of their claims; the dividend, which may be made payable either in a single sum, or by instalments, is usually secured by bills of exchange or promissory notes of the debtor, alone or jointly with a surety. The necessary parties to such deeds are the debtor and the assenting creditors, but a surety often concurs for the purpose of guaranteeing the payment of the dividend; and trustees are usually made parties to receive the moneys and act generally on behalf of the creditors where it is

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not certain that the settlement of the debtor's affairs will be capable of an immediate and simple solution. The deed will also contain a declaration that the composition shall be accepted by the creditors in full satisfaction of their debts, or a release of the debtor conditioned on payment of the composition dividend as stipulated.

Letters of license.

(iii) A letter of license is an instrument whereby creditors grant to a debtor license or permission to continue to manage his trade or business, and conduct his affairs, for a limited period, during which the creditors agree not to sue the debtor, who on his part engages to pay the whole or a stipulated proportion of his receipts to trustees, or into a bank for the benefit of his creditors: the license may be extended from time to time or be allowed to determine on the expiration of the period, according as the arrangement is found to work in a satisfactory manner, or otherwise. A letter of license will often be conveniently made by deed-poll, thereby protecting the transaction from liability to be defeated as an act of bankruptcy, on the ground of implied notice by the debtor of his insolvency.

Inspectorship deeds.

(iv) A modification of the last-mentioned arrangement is, however, frequently adopted by means of an indenture, which provides for the carrying on of a business by the debtor under the superintendence and control of a committee of inspection, consisting of creditors or independent persons appointed for that purpose. The powers and provisions given and relating to the debtor and committee respectively, are subject to great variation according to the requirements of each case, but the general frame of such instruments is as follows: The parties are the debtor, the committee of inspection, the trustees, and the creditors; or sometimes the members of the committee of inspection act also as trustees, and separate trustees are dispensed with. The debtor receives a license to carry on his business and conduct his affairs under the control of the inspectors, until payment in full of the debts, or of a stated composition dividend upon them, or, as may be agreed upon, for a stated period, which may usually be extended by the inspectors; and the creditors

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covenant not to sue in the meantime. The debtor covenants to carry on his business, &c. under supervision, and to make and verify statements of his property and liabilities; and, on breach of covenant, to assign all his property, when called upon, to the inspectors, or to trustees, or to persons to be chosen as trustees for the purpose, upon trust for sale for the benefit of his creditors. The deed will also contain all necessary powers and provisions for enabling the inspectors to superintend the management of the business, and generally to deal with property of the debtor with a view to the discharge of his liabilities.

Various clauses proper to be inserted in creditor deeds will be considered in detail in the notes to the various Precedents appended to this Dissertation.

II. Of Compositions and Arrangements with Creditors under the Bankruptcy Acts.

Stat. 6 Geo. 4, c. 16.

The Bankruptcy Act of 1825 (6 Geo. 4, c. 16), for the first time introduced into English law the principle of allowing a composition to be effected by an insolvent debtor, whereby his affairs might be withdrawn from the administration of the Court of Bankruptcy; and this power was considerably extended and enlarged by the Bankruptcy Act of

Stat. 12 & 13 Vict. c. 106.

1849 (12 & 13 Vict. c. 106), which contained provisions making the acceptance of such arrangements by a specified majority binding upon the whole body of the creditors, with a view to the release of *traders* without making them bankrupt.

These statutory arrangements were of two classes, viz., compositions under the control of the Court, and compositions by deed independently of the Court.

An arrangement of the latter class was not binding upon dissentient creditors, unless it provided for a *cessio bonorum*, or surrender of the whole of the debtor's property for the benefit of his creditors.

The Bankruptcy Act, 1861.

The Bankruptcy Act, 1861 (which abolished most of the former distinctions between traders and non-traders as regards insolvency), gave increased facili-

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ties to debtors to compound with their creditors. By this statute a *cessio bonorum* ceased to be necessary to render the composition binding upon dissentient creditors, and a majority in number of creditors, claiming to an amount not less than three-fourths in value of the total amount of the debts, was empowered to bind the minority, provided the resolution was duly registered in manner prescribed by the Act.

The Bankruptcy Act Amendment Act, 1868.

This enactment, having been found to lead to gross abuses, was amended by the Bankruptcy Act Amendment Act, 1868, which provided that no deed of arrangement entered into between the debtor and his creditors should be binding on all the creditors of such debtor, unless together with the deed there were delivered to the registrar a list showing the debts and liabilities of the debtor, the times at which the debts were incurred, the addresses of his creditors, and other particulars, and also a statement of the debtor's property and of the estimated value thereof; and it was also provided that no creditor should be reckoned in the computation of the majority in number, representing three-fourths in value required by the Act of 1861, unless his claim was proved by affidavit or declaration to be filed with the registrar. This Act also gave powers to dissentient creditors to examine into the debtor's affairs in order to ascertain the amount of his liabilities and property.

The Bankruptcy Act, 1869.

The Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), contained provisions for the arrangement of the affairs of insolvent debtors without bankruptcy by means of composition, and also introduced a new system of arrangement thereof "by liquidation."

Liquidations by arrangement.

By sect. 125 of that Act, it was provided that by a special resolution passed at a meeting of the creditors and duly registered the affairs of a debtor might be liquidated by arrangement and not in bankruptcy. The resolution was to be passed by a majority in number and three-fourths in value of the creditors; those creditors whose debts amounted to 10*l.* or under being reckoned in a majority in value, but not in the majority in number. The liquidation was to be conducted under the control of the Court in the same way

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as in bankruptcy, except as regards the discharge by the comptroller and also as regards the discharge of the debtor and the release of the trustees who were to be appointed by a special resolution of the creditors with or without a committee of inspection. If it appeared that the liquidation by arrangement could not proceed without injustice or undue delay to the creditors or to the debtor, the Court might adjudge the debtor a bankrupt.

Compositions under the Act of 1869.

By sect. 126 of the same Act it was provided that the creditors might by an extraordinary resolution resolve that a composition should be accepted in satisfaction of the debts due to them from the debtor. The resolution was to be passed, confirmed, and registered in manner similar to that prescribed with regard to liquidation by arrangement. Such composition was to be binding on all the creditors whose names and addresses and the amount of the debts due to whom were shown in the statement of the debtor produced at the meeting at which the resolution was passed, but was not to affect or prejudice the rights of any other creditors. The section enabled the Court to enforce the provisions of a composition on the application of any person interested, and for the adjudication of the debtor as a bankrupt on satisfactory evidence that the composition could not proceed without injustice or undue delay to the creditors or to the debtor. A composition could also be accepted after adjudication under sect. 28 of the Act.

Compositions, &c. under the present law.

General summary of effects of the Act.

The foregoing brief retrospect will serve to indicate generally the state of the law with regard to compositions previously to 1884. It is proposed in the following pages to consider how a settlement of a debtor's affairs may be effectual under the present Act otherwise than under an adjudication in bankruptcy. The provisions of the Act of 1869 with regard to winding up the affairs of insolvent debtors by means of compositions were found in practice to lead to grave abuses. By the influence of the friends of the debtor, and by the use of proxies, inadequate compositions were sometimes adopted by the creditors, whereby the debtor, on payment of a small dividend, or even of no divi-

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dend at all, escaped from all his liabilities without any sufficient investigation into his conduct, or of the circumstances which led to his insolvency. The examination of the debtor's affairs prescribed by the Act in the case of a composition was often practically useless, as the conduct of it was left to the creditors themselves, who were often unable or unwilling to sacrifice the time and money necessary to render it effective, even if they were not, as may sometimes have been the case, themselves interested in hushing up matters which they were intended to investigate. To remedy these evils, it began for some time past to be felt that some fresh legislation was necessary. Several bills were brought forward, and finally the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), was passed, which introduced numerous and important changes. The leading principle of this Act, so far as relates to the liquidation of insolvent estates otherwise than by adjudication in bankruptcy, appears to be that it is necessary, in the interests not only of creditors but also of public morality at large, that such arrangements should from first to last be conducted under the supervision and control of the Court.

Policy of the present Bankruptcy Act.

The object of the Legislature in framing the provisions applicable to compositions contained in the present Act would seem to have been to secure that, except as regards the odium and the somewhat greater expense attaching to actual bankruptcy, the effecting a composition shall for the debtor be as serious and as searching a proceeding as bankruptcy itself. Accordingly the Act provides that the initial steps leading to a composition shall be identical with those necessary in the case of proceedings for an adjudication of bankruptcy. It is required that the debtor shall, by means of the statement of his affairs, and of the public examination by an official in open Court, furnish the creditors with complete information as to his conduct and management of his business, before the creditors are allowed to come to a final decision on the question of accepting a composition or scheme of arrangement. And moreover, after a resolution accepting the composition or scheme has been

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passed at the first meeting of the creditors (which may be held either before or after the public examination of the debtor), such resolution will not be binding on the creditors until it has been confirmed at a subsequent meeting, which must be held after the examination.

By requiring that all the details of the composition or scheme shall be settled at the first meeting or at adjournments thereof, and by withholding from the creditors and from the Court any power of amendment or alteration (except in respect of mere mistakes or slips) the present statute seeks to secure, on the one hand, that the debtor shall have the weightiest inducement to make a full disclosure at once; and, on the other hand, that the creditors shall be enabled to grasp the position in its entirety, and to vote upon the proposals laid before them, without apprehension that the arrangement to which they are consenting may be subsequently varied. The Act also provides that the Court, in deciding whether a composition or scheme shall or shall not be approved, is to have before it an official report of all the facts which have been disclosed during the preliminary proceedings, so that it may be in a position to form a judgment on the case upon its merits. Provision is, in addition, made that the whole of the dealings with the debtor's property, after the making of the receiving order, shall be checked and audited by an independent body, interested only in preventing peculation and misconduct. Having thus provided that the compounding debtor shall place himself fully and unreservedly in the hands of his creditors and of the Court, the Act offers to him an advantage which has hitherto been denied, by making a composition or scheme, duly accepted and approved, binding not only on creditors who have notice of the proceedings, but also upon all creditors who have any claims provable against the debtor's estate under the Act. It remains to be seen how far this attempt made in the recent Bankruptcy Act to purify public morals and benefit individual creditors will meet with the success which the excellence of the intentions thereby manifested deserves. But there is, perhaps, some ground for fearing that

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debtors and creditors alike will frequently prefer not to submit their dealings to the minute investigations and somewhat complicated formalities required by the Act, and that the stringency of the provisions above summarised may prove irksome to all parties concerned, and drive them to arrange their matters as best they can without official assistance or interference.

All statutory arrangements must commence with bankruptcy petition.

Acts of Bankruptcy.]—Every proceeding taken under the Bankruptcy Act, 1883, for effecting the liquidation of the affairs of a debtor by arrangement, no less than by an administration under an adjudication of bankruptcy, must commence by the presentation by the debtor, or by a creditor, of a bankruptcy petition grounded on an act of bankruptcy committed by the debtor within three months previous to the presentation of the petition.

Acts of bankruptcy.

This Act, which came into operation on the 1st of January, 1884, and does not extend to Ireland or Scotland, commences with defining the following acts of bankruptcy:—

Sect. 4. "(1.) A debtor commits an act of bankruptcy in each of the following cases:—

"(a) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally (*c*).

Conveyance or assignment for benefit of creditors generally.

(*c*) This clause is similar to sect. 6, sub-sect. 1, of the repealed Act of 1869. A conveyance by a trader of all his property for the benefit of his creditors has long been regarded as an act of bankruptcy, and the Act of 1861 extended the principle to non-traders. By sect. 168 of the present Act, "property" includes money, goods, things in action, and every description of property, whether real or personal, and whether situate in England or elsewhere; also obligations, easements, and every description of estate, interest and profit, present or future, vested or contingent, arising out of, or incident to, property as above defined. Formerly a conveyance or assignment by deed was necessary to constitute an act of bankruptcy: *Rust* v. *Cooper*, 2 Cowp. 629; but this would not seem now to be necessary. It is immaterial that the instrument is insufficiently stamped; *Ponsford* v. *Walton*, L. R., 3 C. P. 167; or imperfectly executed: *Booker* v. *Burdekin*, 11 M. & W. 128. But a delivery of goods will not amount to an act of bankruptcy, unless the delivery passes or purports to pass some estate or interest in the goods: *Cole* v. *Davies*, Ld. Raym. 724; *Cotton* v. *James*, 1 Moo. & M. 273; *Isitt* v. *Beeston*, L. R., 4 Ex. 159.

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"(b) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof (*d*).

Fraudulent conveyance.

(*d*) This clause is similar to sect. 6, sub-sect. 2 of the Act of 1869. An assignment of all his property by a debtor for the benefit of his creditors *generally*, which was under the older statutes included amongst fraudulent conveyances, is expressly constituted an act of bankruptcy by clause (a) of this section. Fraudulent conveyances, &c., within the meaning of clause (b) may be divided into three classes—(i) Dispositions fraudulent under the statute 13 Eliz. c. 5; (ii) Dispositions of the whole of a debtor's property for the benefit of some one or more of his creditors to the exclusion of others; (iii) Fraudulent dispositions of part of a debtor's property.

Fraudulent conveyances, &c. under stat. 13 Eliz. c. 5.

By the statute 13 Eliz. c. 5, all alienations of lands, tenements, hereditaments, goods and chattels, whereby creditors may be delayed, hindered or defrauded, are rendered void, unless made for good, *i. e.*, valuable consideration and *bonâ fide* to persons not having notice of any fraud. Any disposition of property which is fraudulent within the statute of Elizabeth is also fraudulent and an act of bankruptcy under the bankruptcy laws: *Doe* d. *Grimsby* v. *Ball*, 11 M. & W. 531. A conveyance or assignment, even of the whole of a debtor's property, whether or not made with the view of defeating or delaying creditors, but *bonâ fide* for the benefit of one or more particular creditors, will not be fraudulent within this statute; *Wood* v. *Dixie*, 7 Q. B. 892; *Golden* v. *Gillam*, 20 Ch. D. 389; but it will generally constitute an act of bankruptcy, as being fraudulent under the law of bankruptcy: *Alton* v. *Harrison*, L. R., 4 Ch. Ap. 623; *Ex parte Games*, *Re Baniford*, 12 Ch. D. 314. See as to conveyances, &c., fraudulent within this statute, the notes to *Twyne's case*, 1 Smith, L. C. 1. The subject will also be fully discussed when the subject of voluntary settlements is considered, *post*, tit. SETTLEMENTS.

Conveyance of debtor's whole property.

The remaining two classes of fraudulent dispositions of property above referred to require, in this place, fuller discussion, as they have an important bearing on the question of the validity of compositions effected independently of statutory enactments. The conveyance or assignment by a debtor of the whole of his property for the benefit of some one or more of his creditors, to the exclusion of others, must generally be fraudulent, and constitute an act of bankruptcy: *Worsley* v. *De Mattos*, 1 Burr. 467; *Ex parte Luckes*, *Re Wood*, L. R., 7 Ch. Ap. 302. A colourable exception of a small part of the debtor's property will not prevent a disposition from being fraudulent: *Ex parte Foxley*, *Re Nurse*, L. R., 3 Ch. A. 297. As to the exception of a trader's book-debts, see *Ex parte Burton*, *Re Tunstall*, 13 Ch. D. 102; *Ex parte Field*, *Re Marlow*, 13 Ch. D. 106, n. The exception of a farmer's tenant right, not being of present value for the purposes of his business, has been held not to be a substantial exception: *Ex parte Daun*, *Re Parker*, 17 Ch. D. 26. The test of a colourable exception is whether the disposition, if acted upon, would, notwithstanding the property excepted therefrom,

"(c) If in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates

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practically render the debtor insolvent, and, in the case of a trader, stop his business by reason of his insolvency: *Smith* v. *Cannan*, 2 E. & B. 35; *Young* v. *Fletcher*, 3 H. & C. 732; *Ex parte Bland, Re Murgatroyd*, 6 De G., M. & G. 757; *Ex parte Foxley, supra.*

Assignment for sufficient consideration.

A *bonâ fide* sale of all a trader's property at a fair price is not an act of bankruptcy, as such a transaction merely changes the form of the property, and the debtor thereby obtains an equivalent available for the general benefit of his creditors and himself: *Baxter* v. *Pritchard*, 1 A. & E. 456; *Rose* v. *Haycock, ibid.* 460; *Ex parte Wilson*, 22 W. R. 241; *S. C.*, 29 L. T., N. S. 860. In order to set aside an assignment for an equivalent consideration, it is necessary for the person seeking to impeach it to show it to be fraudulent: *Ex parte Colemere*, L. R., 1 Ch. A. 128; so, in the case of a mortgage, the fraud must be brought home to the lender, but neither the motives of the borrower nor the actual result of the advance will be taken into consideration: *Ex parte Johnson, Re Chapman*, 26 Ch. D. 338; and the fact that the debtor intends to appropriate the money for his own purposes in fraud of his creditors, will not affect the interest of the assignee without notice of the fraud: *Baxter* v. *Pritchard*, 1 A. & E. 456; see also *Pennell* v. *Reynolds*, 11 C. B., N. S. 709; *Ex parte Stubbins, Re Wilkinson*, 17 Ch. D. 58.

The price obtained need not necessarily be the full value of the property sold, if the sale is *bonâ fide: Bittlestone* v. *Cooke*, 6 E. & B. 296; *Woodhouse* v. *Murray*, L. R., 4 Q. B. 27. So also the consideration need not be in money: *Hutton* v. *Crutwell*, 1 E. & B. 15; other considerations have been considered sufficient, *e. g.*, the retirement of bills: *Ex parte Reed, Re Tweddell*, L. R., 14 Eq. 586; the discharge of existing incumbrances: *Whitmore* v. *Claridge*, 12 W. R. 214; and the release of goods stopped *in transitu: Ex parte Threlfall, Re Williamson*, 46 L. J., Bank. 8.

Assignment by way of security for present or future advance.

A mortgage of the whole of a debtor's property will not necessarily be a fraudulent conveyance. "Where a conveyance is of the whole property, not merely for an antecedent debt, but also for a present advance, of which the debtor really has the advantage, and which he can apply to the purchase of stock, or otherwise to his own use, the transaction is considered on the same footing as if there were a substantial exception out of the debtor's property, and therefore not be necessarily and *per se* an act of bankruptcy:" per *Willes*, J., in *Lomax* v. *Burton*, L. R., 6 C. P. at p. 112. The fresh advance must of course not be merely colourable, but the smallness of its amount will not necessarily make the mortgage an act of bankruptcy, if the advance is made *bonâ fide* for the purpose of enabling the debtor to continue his business, and not to secure past debts: *Ex parte Fisher, Re Ash*, L. R., 7 Ch. A. 636. See also *Ex parte Johnson, Re Chapman*, 26 Ch. D. 338. The fresh advance may either be made at the time of the assignment, *Mercer* v. *Peterson*, L. R., 3 Ex. 104; *Lomax* v. *Buxton*, L. R., 6 C. P. 107, or may have been

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made previously on an agreement to give subsequent security: *In re Jackson, Ex parte Hall*, 4 Ch. D. 682; or the mortgage may be to secure a future advance, if such advance be afterwards in fact made: *Ex parte Sheen, Re Winstanley*, 1 Ch. D. 560. See also *Ex parte King, Re King*, 2 Ch. D. 256. The fact that further advances are made will not support an assignment of the whole of a debtor's property, unless there is either a stipulation in the assignment, or a *bonâ fide* promise at the time, that such advances shall be made: *Lindon* v. *Sharp*, 6 M. & G. 895; *Ex parte Dann, Re Parker*, 17 Ch. D. 26; *Ex parte Wilkinson, Re Berry*, 22 Ch. D. 788. A conditional stipulation to give security, if requested by the creditor, the performance of which is postponed till the debtor shall be in embarrassed circumstances, will not prevent an assignment from being an act of bankruptcy: *Ex parte Burton, Re Tunstall*, 13 Ch. D. 102. The onus of proof of the agreement rests on the person setting it up: *Ex parte Kilner, Re Barker*, 13 Ch. D. 106.

Forbearance not a sufficient consideration.

Withdrawal of an execution, which is itself an act of bankruptcy, is not sufficient consideration to support an assignment of the whole of a debtor's property; *Woodhouse* v. *Murray*, L. R., 4 Q. B. 27; nor is forbearance to issue execution; *Ex parte Cooper, Re Baum*, 10 Ch. D. 313; nor forbearance to seize goods under a bill of sale: *Ex parte Payne, Re Cross*, 11 Ch. D. 539.

Composition.

Where a debtor assigned the whole of his property in consideration of the assignee giving promissory notes to secure the payment of a composition under a deed entered into between the debtor and his assignee and certain scheduled creditors: it was held that the assignment was an act of bankruptcy, and the composition was set aside on the application of a dissentient creditor: *Ex parte Zwilchenbart, Re Marshall*, 3 M., D. & De G. 671. See *Leake* v. *Young*, 5 E. & B. 955. A statutory composition under the Act of 1869 was held to free the debtor, so as to entitle him to dispose of every part of his property, and a delivery of goods as an indemnity to a surety for payment of such composition was accordingly upheld: *Ex parte Burrell, Re Robinson*, 1 Ch. D. 537. But the principle of this decision was held not to apply where a trustee was interposed: *Ex parte Allard, Re Simons*, 16 Ch. D. 505.

Disposition by a debtor of part of his property.

An assignment of part only of a debtor's property will not generally constitute an act of bankruptcy, nor unless it is made fraudulently with the intent of delaying or defeating the claims of creditors: *Ex parte Hodgkin, Re Softley*, L. R., 20 Eq. 746; *Ex parte Field, Re Marlow*, 13 Ch. D. 106. And fraudulent intent must be clearly shown: *Cattell* v. *Corrall*, 4 Y. & C. 228; *Ex parte Pearson, Re Mortimer*, L. R., 8 Ch. A. 667. The specific appropriation by a debtor of part of his property for payment of particular debts has always been recognized as valid: *Compton* v. *Bedford*, 1 W. Bl. 362.

Where creditors are delayed by particular disposition.

A disposition of part of a debtor's property, which without stopping his business necessarily delays his creditors by depriving them of legal remedies for enforcing their claims, will be an act of bankruptcy, *e. g.*, where the effect of a conveyance was to prevent creditors from seizing debtor's effects in execution under a *fi. fa.*: *Smith* v. *Cannan*, 2 E. & B. 35. See also *Bittleston* v. *Cooke*, 6 E. & B. 296. So also where an insolvent debtor draws all his money out of a bank to prevent its being attached by

any charge thereon which would under this or any other Act be void as a fraudulent preference if he were adjudged bankrupt (*e*).

"(d) If with intent to defeat or delay his creditors (*f*) he does any of the following things, namely, departs out of England (*g*), or being out of England remains out of England, or departs from his dwelling-house (*h*), or otherwise absents himself (*i*), or begins to keep house (*k*).

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a creditor: *Ex parte Halliday, Re Liebert*, L. R., 8 Ch. A. 283. Generally, however, an assignment by a debtor of part of his property if impeachable at all, will be impeachable on the ground of fraudulent preference. Fraudulent preference.

(*e*) This clause is new, and has probably been introduced in consequence of the recent decision of the Court of Appeal, that under the Act of 1869 a voluntary preference of a particular creditor was not in itself a fraud, nor an act of bankruptcy: *Ex parte Stubbins, Re Wilkinson*, 17 Ch. D. 58. The question of fraudulent preference will be considered hereafter in a note to sect. 48 of the present Act. See *post*, p. 451, n. (*d*).

(*f*) The petition must allege the intent: *Ex parte Coates*, 5 Ch. D. 979. If the departure is with intent, &c., it is immaterial that in fact no creditor has been delayed. See in the case of departure abroad, *Holroyd* v. *Whitehead*, 3 Camp. 530. And see as to departure from a dwelling-house, *Fisher* v. *Boucher*, 10 B. & C. 705; *Rouch* v. *Great Western Rail. Co.*, 1 Q. B. 51.

(*g*) As to departure out of England with intent, &c., see *Ex parte Bunney*, 1 De G. & J. 809; *Ex parte Crispin*, L. R., 8 Ch. A. 374; *Ex parte Brandon, Re Trench*, 25 Ch. D. 500. As to arrest of debtors believed to be intending to abscond, see sect. 25.

(*h*) Departure from a public-house, at which the debtor has taken up his abode, is sufficient to constitute an act of bankruptcy: *Holroyd* v. *Gwynne*, 2 Taunt. 176. Departure from dwelling-house.

(*i*) These words will include any act done for the purpose of avoiding a creditor. See *Ex parte Easten*, 2 Dear. 533; *Harvey* v. *Ramsbottom*, 1 B. & C. 55; *Robson* v. *Rolls*, 9 Bing. 648; *Bernasconi* v. *Fletcher*, 10 B. & C. 549. Failure to keep an appointment with a creditor is *primâ facie* evidence of intent to delay: *Russell* v. *Bell*, 10 M. & W. 340; *Tucker* v. *Jones*, 2 Bing. 2; but proof may be given that there was no such intent: *Ex parte Lavender*, 4 D. & C. 484; *Lees* v. *Morton*, 1 Moo. & R. 210. See also *Ex parte Meyer*, L. R., 7 Ch. A. 188. Absenting debtor.

(*k*) "Keeping house" may be evidenced by an order to be denied to creditors, or to all persons generally, followed by actual denial to a creditor: *Mucklow* v. *May*, 1 Taunt. 479; *Hare* v. *Waring*, 3 M. & W. 362; *Ex parte Foster*, 17 Ves. 416. Denial may, however, be explained: *Lazarus* v. *Waithman*, 5 Moo. 317; *Ex parte Preston*, 2 V. & B. 311. If a debtor withdraws from his business rooms to another part of the house, *Key* v. *Shaw*, 8 Bing. 320, or stays at home all day, merely going out in the evening, *Ex parte Bourne*, 16 Ves. at p. 149, he will be committing an act of bankruptcy by keeping house. The above clause is virtually identical with sect. 6 (3) of the repealed Act. Keeping house.

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"(e) If execution issued against him has been levied by seizure and sale of his goods under process in an action in any Court, or in any civil proceeding in the High Court (*l*).

"(f) If he files in the Court a declaration of his inability to pay his debts, or presents a bankruptcy petition against himself (*m*).

"(g) If a creditor has obtained a final judgment (*n*) against him for any amount, and execution thereon not having been stayed, has served on him in England, or by leave of the Court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or

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Levy of execution.

(*l*) By the Bankruptcy Act, 1869, sect. 6 (5), execution so issued and levied for payment of not less than 50*l*., in the case of a trader, constituted an act of bankruptcy. The above clause applies to all debtors alike, and there is no limit as to amount. As to the rights of execution creditors under the present Act, see sect. 45. See also Robson on Bankruptcy, pp. 182, *et seq.*

Declaration of inability to pay.

(*m*) The filing of a declaration of inability to pay debts was an act of bankruptcy under the repealed Act (see sect. 6 (4) of that Act). The declaration must be according to Form 3 in the Appendix, and must be witnessed by a solicitor, or justice of the peace, or an official receiver or registrar of the Court. See rule 117. By rule 194:—"Where a firm of debtors file a declaration of inability to pay their debts or present a bankruptcy petition in the firm name, the declaration or petition shall be accompanied by an affidavit made by one at least of the partners setting forth the names of the partners, and showing that they all concur in the filing of the petition." The act of bankruptcy in this case will apparently be committed not by the firm, but by the individual partners of the firm; "a firm as such cannot commit an act of bankruptcy; an act of bankruptcy must be the personal act or personal default of the person who is to be made bankrupt:" per *Brett*, L. J., in *Ex parte Blaine, Re Sawers*, 12 Ch. D. at p. 529. But proceedings may be taken under the present Act by or against a firm in the partnership name, see sect. 115, *post*, p. 392.

A declaration filed without the debtor's sanction may be set aside: *Ex parte Johnstone*, 4 De G. & S. 204. As to filing by debtor of a bankruptcy petition, see *post*, p. 395.

Final judgment.

(*n*) A garnishee order is not a "final judgment," and a bankruptcy notice cannot be issued in respect of it: *Ex parte Chinery*, 12 Q. B. D. 342; *Ex parte Schmitz*, 12 Q. B. D. 509. So also a balance order made on a contributory in the voluntary winding-up of a company is not a "final judgment" within this clause: *Ex parte Whinney, Re Sanders*, 13 Q. B. D. 476. As to issue of a bankruptcy notice by the executors of a creditor who has obtained a final judgment, see *Ex parte Woodhall*, 13 Ch. D 479.

the Court, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice (*o*), or satisfy the Court that he has a counter-claim, set-off, or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained (*p*).

"(h) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts (*q*).

(*o*) The requirements of the notice are for payment, security or composition. Where after service of a bankruptcy notice, the debtor gave, and the creditor accepted, a promissory note at two months date, for the amount of the debt, it was held that, the note being a conditional payment of the debt, the creditor could not, during the currency of the note, avail himself of the notice to obtain a receiving order against the debtor: *Ex parte Matthew*, 12 Q. B. D. 506. See also *Currie* v. *Misa*, 10 Ex. 153. So also if the creditor grants to the debtor a postponement of the payment beyond the time limited by the statute, he will not be allowed to set up the omission to pay within that time as an act of bankruptcy: *Ex parte Budd*, 1 M., D. & De G. 436. The onus is on the creditor to prove negatively that the debtor has neither paid nor tendered the amount of the debt: *Ex parte Danks*, 2 De G., M. & G. at p. 944. Bankruptcy notice.

"If the creditor keeps out of the way during the time allowed for payment of the debt so that the debtor, being ready and willing, is unable to pay it, an act of bankruptcy will not be committed. And the same consequences will follow if the creditor takes any step which prevents or imposes a legal difficulty in the way of the debtor's complying with the summons:" Robs. Bank., pp. 189, 190, cited with approval by *Brett*, L. J., in *Ex parte Greener*, 15 Ch. D. at p. 463. See also *Ex parte Gretton*, 2 M., D. & De G. 401: *Ex parte Musgrove*, 3 M., D. & De G. 386.

(*p*) This clause is substituted for the corresponding provision in sect. 6, sub-sect. (6), of the repealed Act, whereby non-payment after service of a debtor's summons for payment of a sum not less than 50*l.* in amount was constituted an act of bankruptcy, but such act was available as a ground for a petition only by the creditor who served the summons. The act of bankruptcy defined by the present clause will be available as a foundation for a petition by any creditor, or by the debtor himself; and no limit is put on the amount of the debt for payment of which notice may be issued.

(*q*) The act of bankruptcy here defined is entirely new; it must be given by the debtor to a creditor; a statement of intention to suspend payment, made to a third party, and communicated to a creditor, will evidently not be sufficient. In order to Notice of suspension of payment.

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"(2.) A bankruptcy notice under this Act shall be in the prescribed form (*r*), and shall state the consequences of non-compliance therewith, and shall be served in the prescribed manner."

Bankruptcy petition and receiving order.

Bankruptcy Petition and Receiving Order.]—In all cases where a debtor has committed an act of bankruptcy, proceedings for the purpose of administering his property under the Act are to be commenced by the presentation of a bankruptcy petition either by a creditor or by the debtor (*s*), and the Court will

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constitute an act of bankruptcy the notice need not be in writing: a verbal notice that the debtor has suspended or intends to suspend payment may be sufficient: *Ex parte Nickoll, Re Walker*, 13 Q. B. D. 469; but a mere statement by the debtor in conversation with a creditor that his assets are insufficient to meet his liabilities in full is not sufficient; the notice must be given formally and deliberately and with the intention of giving notice: *Ex parte Oastler, Re Friedlander*, 13 Q. B. D. 471.

(*r*) See Form No. 6 in Appendix to Bankruptcy Rules, 1883.

Form of petition.

(*s*) By rule 125. "Every petition shall be fairly written or printed, or partly written and partly printed, and no alterations, interlineations, or erasures shall be made without leave of the registrar, except so far as may be necessary to adapt a printed form to the circumstances of the particular case. A debtor's petition shall be in Form No. 4, and a creditor's petition shall be in Form No. 10 in the Appendix, with such variations as circumstances may require." For forms, see Appendix to the Bankruptcy Rules, 1883, and *post*, p. 470.

A bankruptcy petition presented by a creditor may be signed on his behalf by his duly constituted attorney: *Ex parte Wallace*, 14 Q. B. D. 22.

Petition, where to be presented.

By sect. 95. "(1) If the debtor against or by whom a bankruptcy petition is presented has resided or carried on business within the London bankruptcy district as defined by this Act for the greater part of the six months immediately preceding the presentation of the petition, or for a longer period during those six months than in the district of any County Court, or is not resident in England, or if the petitioning creditor is unable to ascertain the residence of the debtor, the petition shall be presented to the High Court.

"(2) In any other case the petition shall be presented to the County Court for the district in which the debtor has resided or carried on business for the longest period during the six months immediately preceding the presentation of the petition.

"(3) Nothing in this section shall invalidate a proceeding by reason of its being taken in a wrong Court."

Definition of the London

Sect. 96. "The London bankruptcy district shall, for the purposes of this Act, comprise the city of London and the liberties

make a receiving order on such petition, if properly substantiated, for the protection of the estate until

bankruptcy district.

thereof, and all such parts of the metropolis and other places as are situated within the district of any County Court described as a Metropolitan County Court in the list contained in the Third Schedule."

Rule 126 provides that "when a debtor has for the greater part of six months next preceding the presentation of a bankruptcy petition carried on business within the district of one Court, and resided within the district of another Court the petition shall be filed in the Court within the district of which he has carried on business."

By rule 127. "Every bankruptcy petition shall be attested. If it be attested in England the witness must be a solicitor or justice of the peace or an official receiver or registrar of the Court. If it be attested out of England the witness must be a judge or magistrate or a British consul or vice-consul or a notary public."

By rule 128 (1). "Upon the presentation of a petition either by the debtor or by a creditor, the petitioner shall deposit with the official receiver the sum of five pounds, and such further sum (if any) as the Court may from time to time direct, to cover the fees and expenses to be incurred by the official receiver." (2) "The official receiver shall account for the money so deposited to the creditor, or, as the case may be, to the debtor's estate, and any sum so paid by a petitioning creditor shall be repaid to him out of the first net proceeds of the estate."

Security for costs.

Rule 129 provides that "A petitioning creditor who is resident abroad, or whose estate is vested in a trustee under any law relating to bankruptcy, or against whom a petition is pending under the Act, or who has made default in payment of any costs ordered by any Court to be paid by him to the debtor, may be ordered to give security for costs to the debtor."

The rules also contain the following provisions with respect to the mode in which the statements in a creditor's petition are to be substantiated:—

Verification and copies.

Rule 130. "Every creditor's petition shall be verified by affidavit, and when it is filed there shall be lodged with it two or more copies to be sealed and issued to the petitioner."

Who to verify.

Rule 131. "When the petitioning creditor cannot himself verify all the statements contained in his petition, he shall file in support of the petition the affidavit of some person who can depose to them."

Joint petitioners.

Rule 132. "Where a petition is presented by two or more creditors jointly, it shall not be necessary that each creditor shall depose to the truth of all the statements which are within his own knowledge; but it shall be sufficient that each statement in the petition is deposed to by some one within whose knowledge it is."

Petition to be investigated.

Rule 133. "After the presentation of a creditor's petition, and before sealing the copies of the petition for service, the statements in the petition shall be investigated by the registrar, and where some of the statements in the petition cannot be verified by affidavit, witnesses may be summoned to prove the same."

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the creditors have had the opportunity of deciding in what manner the debtor's property shall be administered. See sect. 5.

As regards the presentation of a petition by a creditor it is enacted :—

Conditions on which creditor may petition (*u*).

Sect. 6. "(1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless—

"(a) The debt owing by the debtor to the petitioning creditor,

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(*u*) As a general rule, any creditor may present a bankruptcy petition against his debtor, subject to the conditions specified in the above section.

Who may present a creditor's petition.

Public officer or agent of company, &c.

By rule 191. "A bankruptcy petition against, or bankruptcy notice to, any debtor to any company or co-partnership duly authorized to sue and be sued in the name of a public officer or agent of such company or co-partnership, may be presented by or sued out by such public officer or agent as the nominal petitioner for and on behalf of such company or co-partnership, on such public officer or agent filing an affidavit stating that he is such public officer or agent, and that he is authorized to present or sue out such petition or bankruptcy notice."

A company or other corporate body may present a petition either by one of its officers authorized in that behalf under the seal of the corporation (see sect. 148), or in its corporate name, in which case the practice is for the petition to be sealed with the corporate seal, and signed by two directors and the secretary. See *Re Calthrop*, L. R., 3 Ch. A. 252.

Joint creditors.

Joint creditors not being partners must all join in the petition: *Brickland* v. *Newsome*, 1 Taunt. 477. But by sect. 115 it is provided that "Any two or more persons, being partners, or any person carrying on business under a partnership name, may take proceedings or be proceeded against under this Act in the name of the firm, but in such case the Court may, on application by any person interested, order the names of the persons who are partners in such firm or the name of such person to be disclosed in such manner, and verified on oath, or otherwise as the Court may direct." A firm may also present a petition by any of its members (see sect. 148). But by rule 192 it is provided that "Where any notice, declaration, petition, or other document requiring attestation is signed by a firm of creditors or debtors in the firm name, the partner signing for the firm shall add also his own signature, *e. g.*, 'Brown & Co., by James Green, a partner in the said firm.'"

Proceedings in partnership name.

Attestation of firm signature.

Trustees.

Where a debt is vested in a trustee for an absolute beneficial owner who is under no disability, the beneficial owner must join with the trustee in the petition: *Ex parte Culley, Re Adams*, 9 Ch. D. 307; *Ex parte Dearle, Re Hastings*, W. N. 1884, p. 231.

Executors.

It was held under the old law that a commission of bankruptcy might be taken out by an executor before probate: *Ex parte Paddy*, 3 Madd. 241; *Rogers* v. *James*, Marsh. 425.

—or, if two or more creditors join in the petition, the aggregate amount of debts owing to the several petitioning creditors, amounts to fifty pounds, and

"(b) The debt is a liquidated sum, payable either immediately or at some certain future time, and

"(c) The act of bankruptcy on which the petition is grounded has occurred within three months before the presentation of the petition, and

"(d) The debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England.

"(2) If the petitioning creditor is a secured creditor, he must, in his petition (*x*), either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt, or give an estimate of the value of his security (*y*). In the latter case, he may be admitted as a petition-

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See further as to who may petition, Robson on Bankruptcy, pp. 119 *et seq.*

Lunatic. A petition on behalf of a lunatic may be presented by his committee or *curator bonis*. See sect. 148; and see *Re James*, 12 Q. B. D. 332.

Infant. An infant may petition by his next friend. A debtor's summons under the Act of 1869 would issue to an infant in his own name: *Ex parte Brocklebank*, 6 Ch. D. 358.

Married woman. Sect. 152 provides that "Nothing in this Act shall affect the provisions of the Married Women's Property Act, 1882." See sects. 2, 8 of that Act, the effect of which seems to be that a married woman may present a petition in her own name without the concurrence of her husband in respect of a debt due to her as her separate estate. If the debt does not belong to her separate estate her husband must concur in the petition. See *Re Atkinson*, 2 Moll. 451.

Power of Court to change carriage of proceedings. Proceedings in bankruptcy are a remedy, the benefit of which a creditor must impart to all the other creditors: *per* Lord *Hardwicke*, C., in *Ex parte Thompson*, 1 Ves. jun., at p. 158. And by the Act of 1883, sect. 107, "Where the petitioner does not proceed with due diligence on his petition, the Court may substitute as petitioner any other creditor to whom the debtor may be indebted in the amount required by this Act in the case of the petitioning creditor."

(*x*) Under the Bankruptcy Act, 1869, sect. 6, it was held that where this statement had not been made in the petition, the omission might be supplied by amendment: *Ex parte Vanderlinden, Re Pogose*, 20 Ch. D. 289.

Estimated value of security. (*y*) Where a secured creditor presents a petition the estimate of the value of the security given by him need not be a true estimate; but if an adjudication is made, the trustee will be

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ing creditor to the extent of the balance of the debt due to him, after deducting the value so estimated in the same manner as if he were an unsecured creditor (*z*).

Proceedings and order on creditor's petition.

Sect. 7. "(1) A creditor's petition shall be verified by affidavit of the creditor, or of some person on his behalf having knowledge of the facts, and served in the prescribed manner.

"(2) At the hearing the Court shall require proof of the debt of the petitioning creditor of the service of the petition, and of the act of bankruptcy, or, if more than one act of bankruptcy is alleged in the petition, of some one of the alleged acts of bankruptcy, and, if satisfied with the proof, may make a receiving order in pursuance of the petition.

"(3) If the Court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause (*a*) no order ought to be made, the Court may dismiss the petition.

"(4) When the act of bankruptcy relied on is non-compliance with a bankruptcy notice to pay, secure, or compound for a judgment debt, the Court may, if it thinks fit, stay or dismiss the petition on the ground that an appeal is pending from the judgment.

"(5) Where the debtor appears on the petition, and denies that he is indebted to the petitioner, or that he is indebted to such an amount as would justify the petitioner in presenting a petition against him, the Court, on such security (if any) being given as the Court may require for payment to the petitioner of any debt which may be established against him in due course of

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entitled to redeem at the estimated value: *Ex parte Taylor, Re Lacey*, 13 Q. B. D. 128.

(*z*) To entitle a creditor to present a petition under the Act of 1869 the debt must have existed at the time when the act of bankruptcy was committed: *Ex parte Hayward*, L. R., 6 Ch. A. 546; and it is conceived that the same rule will apply under the present Act, but see sect. 43, *post*, p. 445. Interest due on an equitable mortgage by deposit of deeds, has been held a "liquidated sum" constituting a good petitioning creditor's debt: *Ex parte Furber, Re King*, 17 Ch. D. 591. So also the amount of differences due by a defaulter on the London Stock Exchange: *Ex parte Ward*, 22 Ch. D. 132. But not damages in a divorce suit: *Ex parte Muirhead*, 2 Ch. D. 22. Nor a debt barred by the Statutes of Limitations: *Ex parte Tynte*, 15 Ch. D. 125.

(*a*) The execution by the debtor, with the assent of a large majority of the creditors, of an assignment of his property to trustees to be administered for the benefit of all the creditors is not a "sufficient cause for refusing to make a receiving order:" *Ex parte Dixon*, 13 Q. B. D. 118.

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law, and of the costs of establishing the debt, may instead of dismissing the petition stay all proceedings on the petition for such time as may be required for trial of the question relating to the debt.

"(6) Where proceedings are stayed, the Court may, if by reason of the delay caused by the stay of proceedings or for any other cause it thinks just, make a receiving order on the petition of some other creditor, and shall thereupon dismiss, on such terms as it thinks just, the petition in which proceedings have been stayed as aforesaid.

"(7) A creditor's petition shall not, after presentment, be withdrawn without the leave of the Court" (*b*).

Debtor's petition and order thereon.

By sect. 8, it is enacted that,—

"(1) A debtor's petition shall allege that the debtor is unable to pay his debts (*c*), and the presentation thereof shall be deemed an act of bankruptcy without the previous filing by the debtor of any declaration of inability to pay his debts, and the Court shall thereupon make a receiving order (*d*).

"(2) A debtor's petition shall not, after presentment, be withdrawn without the leave of the Court" (*e*).

Effect of receiving order (*f*).

The effect of the receiving order is, that an official receiver is thereby constituted *receiver* of the property of the debtor, and therefore, except as directed by this Act, no creditor having a claim provable in bankruptcy will have any remedy in respect thereof against the property or person of

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(*b*) A creditor may be required to give security for costs. See rule 129, p. 391.

(*c*) For form of debtor's petition, see Form No. 4, in Appendix, *post*, p. 470.

(*d*) By rule 149, the order on a debtor's petition is to be made forthwith, but a creditor's petition is not to be heard until after eight days from service thereof, except that in the case of the debtor having filed a declaration of inability to pay debts or for other good cause shown, the Court may hear the petition sooner.

(*e*) As to the withdrawal of a debtor's petition when the claims of his creditors have been satisfied since presentation of the petition, *Ex parte Wemyss*, 13 Q. B. D. 244.

(*f*) By rule 195, "A receiving order made against a firm shall operate as if it were a receiving order made against each of the persons who, at the date of the order, is a partner in the firm." For forms of receiving orders, see Forms 28 and 29 in the Appendix to the Bankruptcy Rules, 1883.

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the debtor, nor may any action or proceeding be brought except with leave of the Court; this provision does not, however, affect the power of secured creditors to deal with their securities. See sect. 9.

The Court has discretionary power, before making a receiving order, to appoint the official receiver to be interim receiver of the property, and to stay any proceedings which have been commenced against the debtor. See sect. 10.

By sect. 12 it is enacted that—

Power to appoint special manager.

"(1) The official receiver of a debtor's estate may, on the application of any creditor or creditors, and if satisfied that the nature of the debtor's estate or business or the interests of the creditors generally require the appointment of a special manager of the estate or business other than the official receiver, appoint a manager thereof accordingly to act until a trustee is appointed, and with such powers (including any of the powers of a receiver) as may be entrusted to him by the official receiver.

"(2) The special manager shall give security and account in such manner as the Board of Trade may direct.

"(3) The special manager shall receive such remuneration as the creditors may, by resolution at an ordinary meeting, determine, or in default of any such resolution, as may be prescribed."

Notice of every receiving order is to be advertised in a local paper. See sect. 13.

Preparation of debtor's statement.

Debtor's Statement of Affairs.]—As soon as the official receiver has notice of his appointment, he is to furnish the debtor with instructions for the preparation of his statement of affairs. See Bankruptcy Rules, 1883, rule 237 (1), and Appendix, Form 35.

The official receiver, or some person deputed by him, is also to have a personal interview with the debtor, to ascertain whether his estate shall be administered summarily as a small bankruptcy under sect. 121 of the Act. The debtor must attend at such time and place as the receiver may appoint. See rule 237.

By sect. 16 of the Act it is enacted that—

Debtor's statement of affairs.

"(1) Where a receiving order is made against a debtor, he shall make out and submit to the official receiver a statement of

and in relation to his affairs in the prescribed form (*g*), verified by affidavit, and showing the particulars of the debtor's assets, debts and liabilities (*h*), the names, residences and occupations of his creditors, the securities held by them respectively, the dates when the securities were respectively given, and such further or other information as may be prescribed or as the official receiver may require.

"(2) The statement shall be so submitted within the following times, namely:

"(i.) If the order is made on the petition of the debtor, within three days from the date of the order.

"(ii.) If the order is made on the petition of a creditor, within seven days from the date of the order.

But the Court may, in either case, for special reasons, extend the time.

"(3) If the debtor fails without reasonable excuse to comply with the requirements of this section, the Court may, on the application of the official receiver, or of any creditor, adjudge him bankrupt.

"(4) Any person stating himself in writing to be a creditor of the bankrupt may, personally or by agent, inspect this statement at all reasonable times, and take any copy thereof or extract therefrom; but any person untruthfully so stating himself to be a creditor shall be guilty of a contempt of Court, and shall be punishable accordingly on the application of the trustee or official receiver."

With regard to the preparation by the debtor of his statement, it is provided by sect. 70 that—

"When the debtor cannot himself prepare a proper statement of affairs, the official receiver may, subject to any prescribed conditions, and at the expense of the estate, employ some person or persons to assist in the preparation of the statement of affairs" (*i*).

(*g*) By rule 196, "In cases of partnership the debtors shall submit a statement of their partnership affairs, and each debtor shall submit a statement of his separate affairs." Statements by partners.

(*h*) Under the Act of 1869, if an estimate of a contingent debt could be made so as to be inserted in the statement, the debtor was bound to make such estimate: *Breslauer* v. *Brown*, 3 App. Cas. 672. See also *Ex parte Peacock*, *Re Duffield*, L. R., 8 Ch. A. 682. All creditors are now bound in respect of all proveable debts; and it is to be observed that Table D. of Form 35 in the Appendix to the Bankruptcy Rules, 1883 (debtor's statement of affairs), does not contain any reference to estimates of liabilities. Contingent debt.

(*i*) Whenever the official receiver so employs any person, he is forthwith to report the matter by letter to the Board of Trade, justifying his action and specifying the remuneration to be Special report as to employment of per-

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Public examination of the debtor.

Public Examination of the Debtor.]—The receiving order having been made, the debtor who has grounds for anticipating that his affairs will be arranged by means of a composition or scheme, no less than he whose creditors are determined to proceed to extremities against him, and to procure his adjudication as a bankrupt, must submit himself to a public examination before the Court.

By sect. 17 it is enacted that,—

"(1) Where the Court makes a receiving order (*j*) it shall hold a public sitting (*k*), on a day to be appointed by the Court, for the examination of the debtor, and the debtor shall attend thereat (*l*), and shall be examined as to his conduct, dealings, and property.

"(2) The examination shall be held as soon as conveniently may be after the expiration of the time for the submission of the debtor's statement of affairs.

"(3) The Court may adjourn the examination from time to time (*m*).

"(4) Any creditor who has tendered a proof, or his representative authorized in writing, may question the debtor concerning his affairs and the causes of his failure.

"(5) The official receiver shall take part in the examination of the debtor; and for the purpose thereof, if specially authorized by the Board of Trade, may employ a solicitor with or without counsel.

"(6) If a trustee is appointed before the conclusion of the examination he may take part therein.

"(7) The Court may put such questions to the debtor as it may think expedient (*n*).

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son to assist debtor.

allowed to such person. See rule 239. As to the place of the charges of such person in the order of payment of costs, see rule 105.

(*j*) By rule 150 (2). "When a receiving order is made the Court shall at the same time fix a day for the public examination of the debtor."

(*k*) Public examinations of debtors must be held in open Court. See rule 5.

(*l*) If without good cause shown the debtor fails to attend any examination ordered by the Court he may be arrested. See sect. 25 (1) (d).

(*m*) Where a debtor fails to afford full and satisfactory explanations of his accounts and affairs generally, the Court will adjourn the examination *sine die*: *Ex parte Milne, Re Denton*, 21 W. R. 435; *S. C.*, 28 L. T., N. S. 175.

(*n*) With regard to the conduct of examinations of the debtor at meetings of creditors under the Act of 1869 (for which

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"(8) The debtor shall be examined upon oath, and it shall be his duty to answer all such questions as the Court may put or allow to be put to him. Such notes of the examination as the Court thinks proper shall be taken down in writing, and shall be read over to and signed by the debtor, and may thereafter be used in evidence against him; they shall also be open to the inspection of any creditor at all reasonable times.

"(9) When the Court is of opinion that the affairs of the debtor have been sufficiently investigated, it shall, by order, declare that his examination is concluded, but such order shall not be made until after the day appointed for the first meeting of creditors."

First meeting of creditors.

First Meeting of Creditors.]—The decision as to the manner in which the debtor's affairs shall be administered rests with the creditors at a meeting to be convened by the official receiver for the purpose. By sect. 15 it is enacted that,—

"(1) As soon as may be after the making of a receiving order against a debtor, a general meeting of his creditors (in this Act referred to as the first meeting of creditors) shall be held for the purpose of considering whether a proposal for a composition or scheme of arrangement shall be entertained, or whether it is expedient that the debtor shall be adjudged bankrupt, and generally as to the mode of dealing with the debtor's property.

"(2) With respect to the summoning of and proceedings at the first and other meetings of creditors, the rules in the first schedule shall be observed" (*o*).

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public examinations are substituted by the present Act), it was held that although a debtor might be examined as to his property and dealings, he was only bound to answer material and relevant questions: *Ex parte Hope*, 9 Ch. D. 398; that though the examination should be neither friendly nor hostile, it ought to be full, fair, and searching: per *Coleridge*, J., in *Ex parte Sagge*, 22 L. J., Q. B. 345; and that a debtor was entitled to the advice of his solicitor as to whether a question is a proper one: *Ex parte Mackenzie, Re Helliwell*, L. R., 10 Ch. A. 88. A debtor cannot refuse to answer on the ground that his answer will incriminate him: *Reg.* v. *Robinson*, L. R., 1 C. C. R. 80; *Ex parte Scholefield, Re Firth*, 6 Ch. D. 230.

Formal defect not to invalidate proceedings.

(*o*) As to formal defects and irregularities the Act provides as follows:—

Sect. 143. "(1) No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that Court.

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It is the duty of the official receiver to summon the first meeting of the creditors. See sect. 70.

Mode of summoning first meeting.

With regard to summoning this meeting the First Schedule to the Act provides as follows:—

Sched. 1, r. 1. "The first meeting of creditors shall be summoned for a day not later than fourteen days after the date of the receiving order, unless the Court for any special reason deem it expedient that the meeting be summoned for a later day (*p*).

R. 2. "The official receiver shall summon the meeting by giving not less than seven days' notice of the time and place thereof in the London Gazette, and in a local paper.

R. 3. "The official receiver shall also, as soon as practicable, send to each creditor mentioned in the debtor's statement of affairs, a notice of the time and place of the first meeting of creditors, accompanied by a summary of the debtor's statement of affairs, including the causes of his failure, and any observations thereon which the official receiver may think fit to make; but the proceedings at the first meeting shall not be invalidated by reason of any such notice or summary not having been sent or received before the meeting.

R. 4. "The meeting shall be held at such place as is in the opinion of the official receiver most convenient for the majority of the creditors."

Conduct of first meeting.

The official receiver, or some person nominated by him, is to be the chairman of the first meeting. See sect. 70 (1), and Sched. 1, rule 7.

"In case of sudden emergency, where there is no official receiver capable of acting, any act or thing required or authorized to be done by an official receiver may be done by the registrar." Rule 243.

"(2) No defect or irregularity in the appointment or election of a receiver, trustee, or member of a committee of inspection, shall vitiate any act done by him in good faith."

(*p*) The day of meeting is to be fixed by the official receiver: rule 185. In order to secure the attendance of the debtor at the first meeting it is provided by rule 184 that—"The official receiver shall give three days' notice to the debtor of the time and place appointed for the first meeting of creditors.

"The notice, which may be in Form No. 58 in the Appendix, *post*, p. 476, may be either delivered to him personally, or sent to him by prepaid post letter, as may be convenient.

"It shall nevertheless be the duty of the debtor to attend such first meeting, although the notice is not sent to or does not reach him."

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With regard to the conduct of a meeting, and the powers and duties of the chairman, the First Schedule to the Act contains the following provisions:—

"Sched. 1, R. 22. The chairman of a meeting may, with the consent of the meeting, adjourn the meeting from time to time, and from place to place.

"R. 23. A meeting shall not be competent to act for any purpose, except the election of a chairman, the proving of debts, and the adjournment of the meeting, unless there are present, or represented thereat, at least three creditors, or all the creditors if their number does not exceed three.

"R. 24. If within half an hour from the time appointed for the meeting a quorum of creditors is not present or represented, the meeting shall be adjourned to the same day in the following week at the same time and place, or to such other day as the chairman may appoint, not being less than seven or more than twenty-one days.

"R. 25. The chairman of every meeting shall cause minutes of the proceedings at the meeting to be drawn up, and fairly entered in a book kept for that purpose, and the minutes shall be signed by him or by the chairman of the next ensuing meeting" (*q*).

Who are entitled to vote at the first meeting.

The qualifications which entitle persons to vote at the first meeting of creditors are defined as follows:—

"Sched. 1, R. 8. A person shall not be entitled to vote as a creditor at the first or any other meeting of creditors, unless he has duly proved a debt (*r*) provable in bankruptcy to be due to him from the debtor, and the proof has been duly lodged before the time appointed for the meeting.

Evidence of proceedings at meetings of creditors.

(*q*) By sect. 133 it is enacted that—"(1.) A minute of proceedings at a meeting of creditors under this Act, signed at the same or the next ensuing meeting, by a person describing himself as, or appearing to be, chairman of the meeting at which the minute is signed, shall be received in evidence without further proof.

"(2.) Until the contrary is proved, every meeting of creditors in respect of the proceedings whereof a minute has been so signed shall be deemed to have been duly convened and held, and all resolutions passed or proceedings had thereat to have been duly passed or had."

(*r*) As to proof of debts see sects. 37—42, and the second schedule to the Act, *post*, p. 436.

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"R. 9. A creditor shall not vote at any such meeting in respect of any unliquidated or contingent debt, or any debt the value of which is not ascertained (*s*).

"R. 10. For the purpose of voting, a secured creditor (*t*) shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him, after deducting the value of his security. If he votes in respect of his whole debt he shall be deemed to have surrendered his security, unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence.

"R. 11. A creditor shall not vote in respect of any debt on or secured by a current bill of exchange or promissory note held by him, unless he is willing to treat the liability to him thereon of every person who is liable thereon antecedently to the debtor, and against whom a receiving order has not been made, as a security in his hands, and to estimate the value thereof, and for the purposes of voting, but not for the purposes of dividend, to deduct it from his proof (*u*).

"R. 12. It shall be competent to the trustee, or to the official

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Contingent or unascertained debts.

(*s*) Where a debtor by a separation deed agreed to pay an annuity to a trustee during the joint lives of himself and his wife, the annuity to cease on cohabitation being resumed, it was held that as the value of the annuity had not been ascertained, the trustee was not entitled to vote at a creditors' meeting: *Ex parte Pearce, Re Greaves*, L. R., 13 Ch. D. 262. See *Ex parte Jackson*, 20 W. R. 1023. See further as to contingent debts, *post*, p. 413.

Secured creditors.

(*t*) "'Secured creditor' means a person holding a mortgage, charge or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor:" sect. 168. The Act of 1883 does not effect any material change in the position hitherto held by a secured creditor; he may either surrender his security and prove for the whole debt (Sch. II. 10); or he may realise his security and prove for any deficiency (*ibid.* 9); or he may in his proof put a value on the security (at which the trustee is entitled to redeem it) and prove for the balance (*ibid.* 11, 12); or he may simply rest on his security: see *White* v. *Simmons*, L. R., 6 Ch. A. 555; and see sect. 9 (2). See further as to secured creditors, sect. 6, sub-sect. 2, *ante*, p. 393, and Sch. II. rules 9—17, *post*, pp. 435, 437, 438.

(*u*) This clause introduces an alteration in the law, so far as voting is concerned, as regards holders of bills of exchange and promissory notes, which were not held to be securities within the meaning of the Act of 1869. See *Ex parte Schofield, Re Firth*, 12 Ch. D. 337. Now, however, if the acceptor of a bill commits an act of bankruptcy the holder may present a petition before the bill comes to maturity. As regards dividends, the decision in *Ex parte Schofield* would seem still to hold good.

receiver, within twenty-eight days after a proof estimating the value of a security as aforesaid has been made use of in voting at any meeting, to require the creditor to give up the security for the benefit of the creditors generally on payment of the value so estimated, with an addition thereto of twenty per cent. Provided that where a creditor has put a value on such security, he may, at any time before he has been required to give up such security as aforesaid, correct such valuation by a new proof, and deduct such new value from his debt, but in that case such addition of twenty per cent. shall not be made if the trustee requires the security to be given up.

"R. 13. If a receiving order is made against one partner of a firm, any creditor to whom that partner is indebted jointly with the other partners of the firm, or any of them, may prove his debt for the purpose of voting at any meeting of creditors, and shall be entitled to vote thereat (*x*).

"R. 14. The chairman of a meeting shall have power to admit or reject a proof for the purpose of voting, but his decision shall be subject to appeal to the Court (*y*). If he is in doubt whether the proof of a creditor should be admitted or rejected he shall mark the proof as objected to and shall allow the creditor to vote, subject to the vote being declared invalid in the event of the objection being sustained."

Mode of voting at meetings.

A corporation may vote by any of its officers authorized in that behalf under the seal of the corporation, a firm by any of its members, and a lunatic by his committee or *curator bonis*. See sect. 148.

A creditor may vote either in person or by proxy: Sch. I. R. 15. Proxies may be general or special. The following are the provisions of the First Schedule to the Act with regard to proxies:—

"Sched. 1, R. 16. Every instrument of proxy shall be in the prescribed form (*z*), and shall be issued by the official receiver, or,

(*x*) See note (*u*), *ante*, p. 392.

(*y*) The fact that a proof is disputed does not necessitate the adjournment of consideration as to whether the objection shall be allowed or not. The admission or rejection of a disputed proof at the first meeting of creditors is an exercise of judicial discretion from which an appeal will lie, which, subject to the power of the Court to extend the time, must be brought within twenty-one days after the decision complained of. See rule 174. See further as to admission and rejection of proofs, *post*, p. 436, *seq.*

(*z*) For forms of proxies, see Forms 54, 55, in Appendix, *post*,

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after the appointment of a trustee, by the trustee, and every insertion therein shall be in the handwriting of the person giving the proxy.

"R. 17. A creditor may give a general proxy to his manager or clerk, or any other person in his regular employment. In such case the instrument of proxy shall state the relation in which the person to act thereunder stands to the creditor.

"R. 18. A creditor may give a special proxy to any person to vote at any specified meeting, or adjournment thereof, for or against any specific resolution, or for or against any specified person as trustee, or member of a committee of inspection.

"R. 19. A proxy shall not be used unless it is deposited with the official receiver or trustee before the meeting at which it is to be used (*a*).

"R. 20. Where it appears to the satisfaction of the Court that any solicitation has been used by or on behalf of a trustee or receiver in obtaining proxies, or in procuring the trusteeship or receivership, except by the direction of a meeting of creditors, the Court shall have power, if it think fit, to order that no remuneration shall be allowed to the person by whom or on whose behalf such solicitation may have been exercised, notwithstanding any resolution of the committee of inspection or of the creditors to the contrary (*b*).

"R. 21. A creditor may appoint the official receiver of the debtor's estate to act in manner prescribed as his general or special proxy (*c*).

"R. 26. No person acting either under a general or special proxy shall vote in favour of any resolution which would directly or indirectly place himself, his partner or employer, in a position

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pp. 474, 475. As to signature by partner for his firm, see rule 192, *ante*, p. 392, n. (*u*). By rule 183 (2), "As soon as a proxy has been used, it shall be filed with the proceedings in the matter." It would seem that a fresh proxy, whether special or general, must be issued for each meeting.

(*a*) The proxy must be so deposited not later than the day before the meeting at which it is to be used: Rule 183 (2).

(*b*) So also a trustee is not allowed to vote, as creditor or proxy for a creditor, on any resolution affecting his remuneration or conduct. See sect. 88, *post*.

Use of proxies by deputy of official receiver.

(*c*) By rule 240, "Where an official receiver who holds any proxy or proxies cannot conveniently attend any meeting of creditors, at which such proxy or proxies might be used, he may depute some person in his employment or under his official control, or some officer of the Board of Trade, by writing under his hand, to attend such meeting and use such proxies on his behalf, and in such manner as he may direct."

to receive any remuneration out of the estate of the debtor otherwise than as a creditor rateably with the other creditors of the debtor. Provided that where any person holds special proxies to vote for the appointment of himself as trustee he may use the said proxies and vote accordingly."

Power of creditors to accept compositions and arrangements.

The first meeting having been duly convened, and a sufficient *quorum* having assembled within half an hour after the time fixed for the meeting (see *ante*, p. 401), the creditors present or represented by their proxies will proceed to consider and determine what course shall be adopted with regard to winding up the debtor's affairs.

By sect. 18 (1) it is enacted that "the creditors may at the first meeting or any adjournment thereof, by special resolution (*d*), resolve to entertain a proposal for a composition in satisfaction of the debts due to them from the debtor, or a proposal for a scheme of arrangement of the debtor's affairs."

If a resolution entertaining any such proposals is carried, the meeting will either proceed as their next business to discuss and settle the terms of the composition or scheme, or if definite terms are not ready to be submitted to the meeting, or fuller information is required, or if for any other reason it seems advisable, the meeting may be adjourned. The terms of the composition or scheme must be settled at the first meeting or adjournments thereof (*e*). The subsequent meeting is to be held for the purpose of confirming or rejecting a composition or scheme. If the composition or scheme is rejected the meeting may proceed to appoint a trustee: Rule 159. The power of adjournment is generally

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Definition of special resolution.

(*d*) "'Special resolution' means a resolution decided by a majority in number and three-fourths in value of the creditors present, personally or by proxy, at a meeting of creditors and voting on the resolution:" sect. 168. As to proxies, see *ante*, p. 403.

(*e*) Under the Act of 1869, where, owing to informality in the proceedings or *bonâ fide* mistake on the part of the debtor or a creditor or any other cause, no valid resolution had been passed, the creditors were still entitled to an opportunity of expressing their wishes as to how the debtor's affairs shall be wound up, and accordingly the Court had power to order a new first meeting to be held: *Ex parte Gibbs, Re Webb*, L. R., 10 Ch. A. 382; *Ex parte Terrell*, 4 Ch. D. 293. It is conceived that this power is not taken away or affected by the present Act.

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essential to a meeting, but if an offer for a composition is rejected at the first meeting, and then the meeting is adjourned, it is not competent for the adjourned meeting to re-open the question and accept the composition: *Ex parte Till, Re Ratcliffe*, 10 Ch. A. 631. By sect. 18 (2), the composition or scheme is not to be binding on the creditors unless it is confirmed by a resolution passed (by a majority in number representing three fourths in value of all the creditors who have proved) at a subsequent meeting of the creditors (*f*), and is approved by the Court.

Any creditor who has proved his debt may assent to or dissent from such composition or scheme by a letter addressed to the official receiver in the prescribed form, and attested by a witness, so as to be received by such official receiver not later than the day preceding such subsequent meeting, and such creditor is to be taken as being present and voting at such meeting. See sect. 18, sub-sect. (2).

The subsequent meeting is to be summoned by the official receiver by not less than seven day's notice (*g*), and is not to be held until after the public examination of the debtor is concluded (*h*). The notice is to state generally the terms of the proposal,

(*f*) No provision is made in the present Act, or the rules thereunder, for any addition to or variation in the terms of the composition or scheme: the Act of 1869, sect. 126, expressly empowered the creditors by extraordinary resolution to add to or vary the provisions of any composition previously accepted by them, without prejudice to any taking interests under such provisions, who did not assent to such addition or variation.

For form of resolution confirming a composition or scheme, see Form 64 in Appendix, *post*, p. 479.

(*g*) For this notice see Form No. 63 in the Appendix, *post*, p. 479.

Discretionary power of Court to dispense with public examination of debtor.

(*h*) By sect. 105, sub-sect. 6: "For the purpose of approving a composition or scheme by joint debtors, the Court may, if it thinks fit, and on the report of the official receiver that it is expedient so to do, dispense with the public examination of one of such joint debtors, if he is unavoidably prevented from attending the examination by illness or absence abroad."

It is to be observed that the present Act does not require the debtor to attend subsequent meetings of creditors, as was required by the Act of 1869 (see sect. 19 of that Act). The public examination of the debtor provided for in sect. 17 of the present Act appears to be regarded as rendering such attendance unnecessary.

and shall be accompanied by a report of the official receiver thereon. See sect. 18, sub-sect. (3).

With regard to the summoning of subsequent meetings, the First Schedule to the Act contains the following provisions:—

Summoning and conduct of subsequent meetings.

"R. 5. The official receiver or the trustee may at any time summon a meeting of creditors, and shall do so whenever so directed by the Court (*i*), or so requested in writing by one fourth in value of the creditors.

"R. 6. Meetings subsequent to the first meeting shall be summoned by sending notice (*k*) of the time and place thereof to each creditor at the address given in his proof, or if he has not proved, at the address given in the debtor's statement of affairs,

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(*i*) For order of Court to summon meetings, see Form 61 in the Appendix, *post*, p. 478. With regard to meetings summoned by the Court, rule 13 provides that where the Court orders a general meeting of creditors to be summoned under rule 5 of Schedule I. to the Act, it shall be summoned as the Court directs, and in default of any direction the registrar shall transmit a sealed copy of the order to the trustee (or, as the case may be, the official receiver) and the trustee or official receiver shall, not less than seven days before such meeting, send a copy of the order to each creditor at the address given in his proof, or, when he shall not have proved, the address given in the list of creditors by the debtor, or such other address as may be known to the trustee or official receiver.

Notices of subsequent meetings.

(*k*) With regard to notices of subsequent meetings of creditors the Bankruptcy Rules, 1883, provide as follows:—

Form and length of notice.

"186. The notices of subsequent meetings to be issued by the official receiver or trustee to creditors may be in the Form No. 62 in the Appendix, with such variations as circumstances may require. Where no special time is prescribed the notices shall be sent off not less than three days before the day appointed for the meeting.

Non-reception of notice.

"187. Where a meeting of creditors is called by notice, the proceedings had and resolutions passed at such meeting shall, unless the Court otherwise orders, be valid, notwithstanding that some creditors shall not have received the notice sent to them.

Proof of notice.

"188. An affidavit by the trustee, official receiver, or other officer of the Court, or the solicitor in the matter, or by the clerk of any such person, that the notice has been duly posted, shall be sufficient evidence of such notice having been duly sent to the person to whom the same was addressed."

Costs.

As to the costs of calling meetings, rule 189 provides that "The costs of summoning a meeting of creditors at the instance of any person other than the official receiver or trustee shall be paid by the person at whose instance it is summoned, to be repaid to him out of the estate if the creditors or the Court shall so direct."

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or at such other address as may be known to the person summoning the meeting."

The chairman at subsequent meetings may be such person as the meeting shall by resolution appoint. See sched. 1, rule 7.

The regulations as to the conduct of the first meeting of the creditors (see *ante*, p. 401) will apply to subsequent meetings, except that a creditor who had not proved his debt at the time of the first meeting, will be entitled to vote, provided he has proved his debt and duly lodged his proof before the time appointed for the subsequent meeting. See sched. 1, rule 8, *ante*, p. 401.

Approval of Court.

The debtor or the official receiver may, after the composition or scheme is accepted by the creditors, apply to the Court to approve it, and notice of the time appointed for hearing the application shall be given to each creditor who has proved: sect. 18, sub-sect. (4) (*l*).

The Court, before approving a composition or scheme (*m*), is to hear a report of the official receiver as to the terms of the composition or scheme, and as to the conduct of the debtor, and any objections which may be made by or on behalf of any creditor (*n*). See sect. 18, sub-sect. (5).

(*l*) For notice to creditors of application to the Court to sanction a composition, see Form No. 65 in the Appendix, *post*, p. 479. The application must be made in open Court, sect. 99 (2) (d).

By rule 160 it is directed that the party applying to the Court to sanction a composition or scheme, shall, not less than seven days before the day appointed for hearing the application, send notice of his application to the official receiver, and to every creditor who has proved.

(*m*) By rule 161 "The Court, before sanctioning a composition or scheme, shall in addition to investigating the other matters required by the Act, require proof that the provisions of subsects. (1), (2), and (3) of sect. 18 of the Act have been complied with."

A form of order approving a composition or scheme is given in the forms annexed to the Act, No. 47 (see *post*, p. 472). The registrar is to give notice of every such order to the Board of Trade, who are to gazette the same. For form of notice see Form No. 127 (4).

(*n*) An objection to the proof of a creditor need not necessarily be taken at the first meeting of the creditors, it may be taken at

If the Court is of opinion that the terms of the composition or scheme are not reasonable (*o*), or are

Refusal to approve.

the second meeting or apparently at any time before the approval of the composition by the Court. See *Ex parte Weil, Re Menthrop,* 5 Ch. D. 345.

Composition must be reasonable.

(*o*) The Court may form its opinion as to the reasonableness or otherwise of a composition or scheme, whether any objections be raised by any creditor or not. See *Ex parte Williams*, 18 Ch. D. 425. In forming an opinion the Court, though it will give due weight to the fact that the creditors have pronounced a composition or scheme to be fair and reasonable, will inquire for itself what may be expected from the debtor's assets, and who are the creditors who will share those assets between them; and if it appears that a considerable number of alleged creditors have not put in proofs, or that some of the proofs put in require investigation, the Court will refuse its sanction: *Ex parte Rogers*, 13 Q. B. D. 438.

A covenant that the creditors parties to the deed should indemnify the debtor against all negotiable instruments on which he might have incurred any liability, or which might have been indorsed or put into circulation by any or either of the said creditors, was held to be an unreasonable stipulation under the Bankruptcy Act, 1861: *Woods* v. *Foote*, 11 W. R. 383. Where a trust deed for the benefit of creditors, intended to bind the creditors generally under sect. 192 of the same Act, contained a power for the trustees to carry on the business of the debtors without any limit as to time, and a provision that "the trustees should be indemnified out of the joint or separate estate of the debtors, or otherwise by the creditors according and in proportion to the amount of their respective debts, against or in respect of all transactions and personal engagements, matters, and things whatsoever, which they should lawfully do or cause to be done, or enter into, or order, or direct, in or concerning the management or conduct of the business" under the trusts and powers of the deed, it was held that the imposition of a personal liability on non-assenting creditors was unreasonable and the deed was set aside: *Wigfield* v. *Nicholson*, L. R., 3 Q. B. 450. And in a very recent case the Court refused its approval to a scheme of arrangement entertained by the creditors under the present Act, where the instrument embodying the terms of the arrangement contained a provision that the debtors should be discharged whenever the committee of inspection should so resolve. The Court intimated an opinion that a provision making the debtor's discharge depend on some specified event would not have been unreasonable: *Ex parte Clark*, 13 Q. B. D. 426; and see observations of *Baggallay*, L. J., *ibid.* at p. 435.

An assignment for the benefit of creditors has been held not to be avoided by a clause providing that the trustee may employ the debtor in getting in the estate and in carrying on his business, if it appears that the carrying on the trade is for the purpose of rendering the sale and distribution more beneficial to the creditors, and not for the sake of future profits to the debtor. See *James* v. *Whitbread*, 11 C. B. 406; *Coates* v. *Williams*, 7 Exch. 205.

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not calculated to benefit the general body of creditors (*p*), or in any case in which the Court is required

The following stipulations have been held to be reasonable under former Bankruptcy Acts:—that the costs of negotiating and carrying out the arrangement and of embodying the terms in a deed shall be provided for: *Strick* v. *De Mattos*, 3 H. & C. 22: see *Spitzer* v. *Chaffers*, 14 C.B., N.S. 686: that the composition shall be paid by instalments: *Dewhirst* v. *Jones*, 3 H. & C. 60; *Stone* v. *Jellicoe*, 12 W. R. 922; that payment of the debts shall be postponed for two years although the creditors obtained no benefit from the deed except the covenant of the debtor, *i. e.*, the conversion of their simple contract debts into specialty debts: *Ex parte King, Re Richmond Hill Hotel Co.*, L. R., 3 Ch. A. 10; that the trustees may make an allowance to the debtor for maintenance: *Re Edis*, 12 W. R. 1013; that on default of the debtor in payment of the composition dividend to any creditor, that creditor was to be at liberty to sue for the whole of his original debt: *Sorey* v. *Law*, L. R., 3 Q. B. 281. As regards the last stipulation it is to be remarked that rule 164, *post*, p. 414, provides that in case of default in payment under an approved composition or scheme, the remedy is to be not by action but by application to the Court: it is not quite clear whether a stipulation that the claim on an application to the Court under this rule might be by way of claim for the original debt would be held to be reasonable. It must, moreover, be borne constantly in mind that it does not necessarily follow that clauses in deeds which have been held to be reasonable under former Bankruptcy Acts will be held to be reasonable within the provisions of the present Act.

(*p*) The proposed composition must be for the benefit of the creditors generally. "The legislature has given great power to the majority, but it must be exercised *bonâ fide* in the interest of the creditors, and not from motives of kindness to the debtor:" per *James*, L. J., in *Ex parte Page*, 2 Ch. D. at p. 324. In the absence of proof as to the motives which have induced the acceptance by creditors of a composition or scheme, the Court will generally consider that such acceptance has been improperly obtained where there is a gross disproportion between the amount proposed to be paid by way of composition and the debts; *e. g.*, debts, 1,293*l.*, assets, *nil.*, proposed composition, sixpence in the pound: *Ex parte Ball*, 20 Ch. D. 670; debts, 304*l.*, assets, 8*l.* 13*s.*, composition (opposed), threepence in the pound: *Ex parte Russell*, 22 Ch. D. 778; but compositions for very small amounts have been sanctioned, if not opposed; *e. g.*, debts, 130*l.*, assets, 7*l.*, composition, threepence in the pound: *Ex parte Elworthy*, L. R., 20 Eq. 742; especially if secured: see *Ex parte Hudson*, 22 Ch. D. 773. The fact that where a composition is not immediately payable in full, proper security is not given for the amount to be paid on the future instalments thereof, is a sufficient reason for a refusal to give the sanction of the Court to the resolutions: *Ex parte Merchant Banking Company of London*, 16 Ch. D. 623. See also *Ex parte Terrall*, 4 Ch. D. 293; *Ex parte Aaronson*, 7 Ch. D. 713; *Ex parte Williams*, 18 Ch. D. 495.

under this Act where the debtor is adjudged bankrupt to refuse his discharge, the Court shall, or if any such facts are proved as would under this Act justify the Court in refusing, qualifying, or suspending the debtor's discharge (*q*), the Court may, in its

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(*q*) By sect. 28, sub-sect. (2) of the Act it is provided, "That the Court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanor under this Act, or Part II. of the Debtors Act, 1869, or any amendment thereof, and shall on proof of any of the facts hereinafter mentioned either refuse the order or suspend the operation of the order for a specified time, or grant an order of discharge" subject to any conditions with respect to subsequent earnings, income, or property.

"(3) The facts hereinbefore referred to are—

(a) That the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by him, and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his bankruptcy.

(b) That the bankrupt has continued to trade after knowing himself to be insolvent.

(c) That the bankrupt has contracted any debt provable in the bankruptcy without having at the time of contracting it any reasonable or probable ground of expectation (proof whereof shall lie on him) of being able to pay it.

(d) That the bankrupt has brought on his bankruptcy by rash and hazardous speculations, or unjustifiable extravagance in living.

(e) That the bankrupt has put any of his creditors to unnecessary expense by a frivolous defence to any action properly brought against him.

(f) That the bankrupt has within three months preceding the date of the receiving order, when unable to pay his debts as they become due, given an undue preference to any of his creditors.

(g) That the bankrupt has on any previous occasion been adjudged bankrupt, or made a statutory composition or arrangement with his creditors.

(h) That the bankrupt has been guilty of any fraud or fraudulent breach of trust."

Retrospective effect of the Act.

These provisions are retrospective so as to apply to misconduct of which the debtor has been guilty before the Act came into operation, if the proceedings are instituted under the Act: *Ex parte Rogers, Re Rogers*, 13 Q. B. D. 438.

Discovery of debtor's property, &c.

By sect. 27, sub-sect. (1), the Court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the

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discretion, refuse to approve the composition or scheme. Sect. 18, sub-sect. (6).

If the Court approves the composition or scheme, the approval may be testified by the seal of the Court being attached to the instrument containing the terms of the composition or scheme, or by the terms being embodied in an order of the Court (*r*). Sect. 18, sub-sect. (7).

Approved composition or scheme binding on all creditors.

A composition or scheme accepted and approved in pursuance of sect. 18, is to be binding on all the creditors (*s*) so far as relates to any debts due to

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Court may deem capable of giving information respecting the debtor, his dealings, or property; and the Court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings, or property.

The Act of 1869, sect. 96, gave similar powers to the Court, "on the application of the trustee, at any time after an order of adjudication had been made;" and sect. 125 of that Act expressly provided that all the provisions of the Act should, so far as the same were applicable, apply to the case of a liquidation by arrangement, in the same manner as if the word "bankrupt" included a debtor whose affairs were under liquidation; but it was held that these powers had no application to proceedings in composition: *Ex parte Willey, Re Wright*, 23 Ch. D. 118. Now, however, inasmuch as the power is exerciseable at any time after the receiving order has been made, and as a composition or scheme of arrangement under the Act cannot take place except upon the making of a receiving order, it is clear that this enactment applies to compositions and schemes.

The Court has power in its discretion to compel a mortgagee to produce his mortgage deed: *Ex parte Caldecott*, Mont. 55; *Re Marks*, L. R., 1 Ch. A. 429; *Re Thorp*, 17 Ch. D. 512. Any person who has had any transactions whatever with the debtor may be compelled to make discovery: *Ex parte Eckersley, Re Lewtas*, 48 L. T. 832.

Correction of formal slips, &c.

(*r*) By rule 162, "at the time a composition or scheme is sanctioned, the Court may correct or supply any accidental or formal slip, error or omission therein, but no alteration in the substance of the composition or scheme shall be made."

Proceedings if scheme sanctioned.

By rule 163, "where a composition or scheme is sanctioned, the official receiver shall forthwith put the debtor (or, as the case may be, the trustee under the composition or scheme) into possession of the debtor's property. The Court shall also rescind the receiving order."

(*s*) This sub-section gives to a duly approved and accepted composition or scheme an efficacy which it did not possess under the former law: see *ante*, p. 381. The Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), sect. 126, enacted (sub-sect. 7) that the provisions of a composition accepted by an extraordinary resolution in

them from the debtor and provable in bankruptcy (*t*). See sect. 18, sub-sect. (8).

pursuance of that section should be binding on all the creditors whose names and addresses, and the amount of the debts due to whom, were shown in the statement of the debtor, produced to the meetings at which the resolution was passed, but should not affect or prejudice the rights of any other creditors.

Contingent debts.

(*t*) As to estimating the amount of a contingent debt, the burden is thrown on the debtor: *Breslauer* v. *Brown*, 3 App. Ca. 672; but the creditor is not bound to accept the debtor's estimate: *Ex parte Carew*, L. R., 10 Ch. App. 308; where, however, the estimate is accepted, the composition is to be based on it, even where the estimate proves to be excessive: *Ex parte Peacock*, L. R., 8 Ch. A. 682, 687.

Where a claim is disputed and has been referred to arbitration the amount of it cannot be stated, and it is not the subject of sect. 126 of the Act of 1869, and probably would be held not to be the subject of this sub-section. See *Melhado* v. *Watson*, 2 C. P. D. 281. In that case *James*, L. J., said in his judgment, at p. 291:—"I am of opinion that sect. 126 has no application to the present case. A composition under that section is a matter between a debtor and his admitted creditors. A debtor cannot be permitted to dispute a creditor's debt, and at the same time to compound for it; he cannot force the creditor to an arbitration and claim to pay him a composition as the result of an arbitration."

Formerly if creditors agreed to accept a composition payable in instalments, some of which were guaranteed by a surety, on default being made in any one instalment the creditors had a right to sue the debtor, or to prove in his bankruptcy, for the balance of their original debts, after deducting what they had received, either from the debtor or the surety, in respect of the composition, and not merely for the amount of the unpaid instalments of the composition. But it seems doubtful if this claim would be allowed in the case of an application to the Court under rule 164, q. v., *post*, p. 414, n. (*z*). And the surety, though he is entitled to prove in the debtor's bankruptcy for what he has paid in respect of the composition, has no right to put the creditors to an election whether they will carry out the composition arrangement *in toto* or reject it *in toto*: *Ex parte Gilbey*, 8 Ch. D. 248.

Effect of composition or scheme.

Sect. 19 of the present Act enacts that "Notwithstanding the acceptance and approval of a composition or scheme, such composition or scheme shall not be binding on any creditor, so far as regards a debt or liability from which, under the provisions of this Act, the debtor would not be discharged by an order of discharge in bankruptcy, unless the creditor assents to the composition or scheme."

A composition or scheme is binding on the Crown. See sect. 150.

A creditor who has accepted a dividend under a composition cannot keep the balance of his debt alive by private arrangement with the debtor.

Of Compositions under the Law of Bankruptcy.

Evidence.

A certificate of the official receiver that a composition or scheme has been duly accepted and approved (*u*) shall in the absence of fraud (*x*) be conclusive as to its validity (*y*). Sect. 18, sub-sect (9).

Enforcement of composition.

The provisions of a composition or scheme under sect. 18, may be enforced by the Court on application by any person interested, and any disobedience of an order of the Court made on the application shall be deemed a contempt of Court (*z*). See sect. 18, sub-sect. (10).

(*u*) The form of this certificate is as follows (Form No. 51):—

Title.

I hereby certify that a composition [*or* scheme of arrangement] between A. B. of &c., the above-named debtor, and his creditors was duly sanctioned by the Court on the day of .

Dated . M. N., Official Receiver.

(*x*) It has been held by the Court of Appeal that where a defendant pleads a composition in bar of an action, a reply alleging that the composition was obtained by fraud is good: *Eyre* v. *Smith*, 2 C. P. D. 435. The Queen's Bench Division came to a different decision in *Wadsworth* v. *Pickles*, 5 Q. B. D. 470, but it does not appear from the report that *Eyre* v. *Smith* was then cited. See also on this point *Lewis* v. *Leonard*, 5 Ex. D. 165.

(*y*) Sect. 28 of the Act of 1869 rendered the "approval of the Court" similarly conclusive. Under that Act it was held that where a bankruptcy was annulled, and the debtor's property vested in a trustee for payment of a composition which had been approved by the Court, an execution creditor might be restrained from proceeding with the execution: *Re Chidley* 1 Ch. D. 177.

(*z*) The application is to be by motion which may be heard in chambers: Rule 19. A creditor omitted from a composition in which no trustee was appointed was held, under the similar provisions of the Bankruptcy Act, 1869, not to be a "person interested:" *Ex parte Lacey*, 16 Ch. D. 31.

Non-payment of composition.

By rule 164, "where a composition or scheme is sanctioned, and default is made in any payment thereunder, either by the debtor or the trustee (if any), no action to enforce such payment shall lie, but the remedy of any person aggrieved shall be by application to the Court."

Dividends under composition or scheme.

And by rule 167, "where under any composition or scheme provision is made for the payment of any moneys to creditors entitled thereto, and any claim, in respect of which a proof has been lodged, is disputed, the Court may, if it shall think fit, direct that the amount which would be payable upon such claim, if established, shall be secured in such manner as the Court

Of Compositions under the Law of Bankruptcy.

Power to annul compositions, &c.

If default is made in payment of any instalment due in pursuance of the composition or scheme (*a*), or if it appears to the Court, on satisfactory evidence, that the composition or scheme cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, or that the approval of the Court was obtained by fraud, the Court may, if it thinks fit, on application by any creditor, adjudge the debtor bankrupt, and annul the composition or scheme (*b*), but without prejudice to the validity of any sale, disposition, or payment duly made, or thing duly done under or in pursuance of the composition or scheme. Where a debtor is adjudged bankrupt under this sub-section, any debt provable in other respects, which has been contracted before the date of the adjudication, is to be provable in the bankruptcy. See sect. 18, subsect. (11).

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shall direct, until the determination of the claim so disputed; and on the determination thereof the sum so secured shall be paid as the Court may direct."

(*a*) These words would seem to include the case of default in payment of an instalment by a surety, as well as a default by the debtor. The express mention in the above section of default in payment of an instalment as a ground for annulling the composition or scheme disposes of the doubts which had arisen under the Act of 1869, as to whether default in this respect was "sufficient cause" for such annulment. See *Ex parte Charlton*, 6 Ch. D. 45.

Annulment of composition.

(*b*) With regard to the annulment of a composition or scheme the Bankruptcy Rules, 1883, contain the following provisions:—

Vesting of property.

Rule 165. "Where a composition or scheme is annulled, the property of the debtor shall, unless the Court otherwise directs, forthwith vest in the official receiver, to whom the estate was originally assigned, without any special order being made or necessary."

Rule 166. "Where a composition or scheme is annulled, the trustee under the composition or scheme shall pay over and account for, to the trustee under the bankruptcy, any moneys or property of the debtor which may have come into his hands."

III. Mode of Winding-up an Estate under Statutory Compositions or Schemes of Arrangement.

If, under or in pursuance of a composition or scheme, a trustee is appointed to administer the debtor's property or manage his business, Part V. of the Act (*c*) is to apply to the trustee as if he were a trustee in a bankruptcy, and as if the terms "bankruptcy," "bankrupt," and "order of adjudication" included respectively a composition or scheme of arrangement, a compounding or arranging debtor, and order approving the composition or scheme. Sect. 18, sub-sect. (12).

Part III. of the Act is, so far as the nature of the case and the terms of the composition or scheme admit, to apply thereto, the same interpretation being given to the words "trustee," "bankruptcy," "bankrupt," and "order of adjudication," as in the last-mentioned sub-section. Sect. 18, sub-sect. (13).

Trustees.

Remuneration, Duties, Release, &c. of Trustees.]—Part V. of the Act is intituled "Trustees in Bankruptcy," and relates to their remuneration, costs and expenses, accounts, removal, &c.; it consists of sects. 72—91 of the Act, which are set out at length in the following pages.

Remuneration of Trustee.]—With regard to the remuneration of trustees of the estates of debtors, the Bankruptcy Act, 1883, enacts as follows:—

Remuneration of trustee.

Sect. 72. "(1) Where the creditors appoint any person to be trustee of a debtor's estate, his remuneration (if any) shall be fixed by an ordinary resolution of the creditors (*d*) or if the cre-

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(*c*) It is to be observed that the application of Part V. of the Act to compositions and schemes of arrangement, where a trustee is appointed, is unqualified. The substituted expressions are printed in italics.

(*d*) "An ordinary resolution means a resolution decided by a majority in value of the creditors present personally or by proxy at a meeting of creditors and voting on the resolution." Sect. 168. The vote of the trustee, or his partner, clerk, solicitor, or solicitor's clerk, either as creditor or proxy, will not count on a resolution respecting the remuneration. See sect. 88, *post*, p. 428.

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ditors so resolve by the committee of inspection, and shall be in the nature of a commission or percentage, of which one part shall be payable on the amount realised, after deducting any sums paid to secured creditors out of the proceeds of their securities, and the other part on the amount distributed in dividend (*e*).

"(2.) If one-fourth in number or value of the creditors dissent from the resolution, or the *compounding or arranging debtor* satisfies the Board of Trade that the remuneration is unnecessarily large, the Board of Trade shall fix the amount of the remuneration.

"(3.) The resolution shall express what expenses the remuneration is to cover, and no liability shall attach to the *compounding or arranging debtor's* estate, or to the creditors, in respect of any expenses which the remuneration is expressed to cover.

"(4.) Where no remuneration has been voted to a trustee he shall be allowed out of the *compounding or arranging debtor's* estate such proper costs and expenses incurred by him in or about the proceedings of the *composition or scheme of arrangement* as the taxing officer may allow (*f*).

"(5.) A trustee shall not, under any circumstances whatever, make any arrangement for or accept from the *compounding or arranging debtor*, or any solicitor, auctioneer, or any other person that may be employed about a *composition or scheme of arrangement*, any gift, remuneration, or pecuniary or other consideration or benefit whatever beyond the remuneration fixed by the creditors and payable out of the estate, nor shall he make any arrangement for giving up, or give up, any part of his remuneration, either as receiver, manager, or trustee to the *compounding or*

Rate of remuneration.

(*e*) As regards the manner in which the remuneration is to be calculated, rule 224 provides that "The creditors, or, as the case may be, the committee of inspection, in voting the remuneration of the trustee, shall distinguish between the commission or per-centage payable on the amount realised, and the commission or per-centage payable on the amount distributed in dividend.

"The rate of commission or per-centage on the amount realised shall not exceed the rate on the amount distributed; for instance, if the commission or per-centage on the amount distributed be two per cent., the commission or per-centage on the amount realised shall not exceed two per cent."

(*f*) Trustees under an assignment for the benefit of creditors were allowed the expense of employing an agent to proceed to America to recover part of the debtor's property: *Ex parte Shaw*, De G. 242. Travelling expenses incurred *bonâ fide* for the benefit of the estate have also been allowed: *Ex parte Joyner*, 2 Mont. & A. 1; *Ex parte Lovegrove*, 2 Mont. & A. 4.

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arranging debtor, or any solicitor or other person that may be employed about a *composition or scheme of arrangement*."

Costs of trustees and managers.

Costs.]—The allowance and taxation of the costs of trustees and managers are regulated by sect. 73 of the Act, which provides that—

Allowance and taxation of costs.

"(1.) Where a trustee or manager receives remuneration for his services as such, no payment shall be allowed in his accounts in respect of the performance by any other person of the ordinary duties which are required by statute or rules to be performed by himself (*g*).

"(2.) Where the trustee is a solicitor he may contract that the remuneration for his services as trustee shall include all professional services (*h*).

"(3.) All bills and charges of solicitors, managers, accountants, auctioneers, brokers and other persons, not being trustees, shall be taxed by the prescribed officer (*i*), and no payments in respect thereof shall be allowed in the trustee's accounts without proof of such taxation having been made. The taxing master shall satisfy himself before passing such bills and charges that the employment of such solicitors and other persons, in

(*g*) The trustee will be entitled to be repaid all expenses properly incurred by him in winding-up the estate, including advances made by him out of his own moneys for the benefit of the estate, unless such expenses are covered by his remuneration. See *Ex parte Kennard*, 21 L. T., N. S. 684; *Ex parte Augustine*, L. R., 9 Ch. A. 479; *Pitts* v. *La Fontaine*, 5 App. Ca. 482; *Watson* v. *Holliday*, 20 Ch. D. 780. As to advances by a receiver and manager without the authority of the Court, see *Ex parte Izard*, *Re Bushell*, 23 Ch. D. 75.

(*h*) A solicitor has no lien on the proceedings for his costs: *Anon.*, 1 Rose, 207; but he may have a lien on papers of the debtor which have come into his hands before the receiving order was made without notice of any act of bankruptcy: *Lambert* v. *Buckmaster*, 2 B. & C. 616. But, by rule 259, no person shall, as against the official receiver or trustee, be entitled to withhold possession of the books of accounts belonging to the debtor, or to set up any lien thereon. See as to this, Baldwin on Bankruptcy, 233, 246, and the cases there cited.

No lien on debtor's books.

Lower scale of costs if estate under 300*l.*

(*i*) Rule 103 provides that "Where the estimated assets of the debtor do not exceed the sum of 300*l.* a lower scale of solicitor's costs shall be allowed, namely, three-fifths of the charges ordinarily allowed, disbursements being added, and if in error any charges have been allowed or paid on the higher scale, and the gross proceeds of the assets shall be ascertained not to exceed 300*l.*, the excess shall be disallowed, and if paid, shall be repaid to the trustee."

Rule 102 provides that, "In a County Court, costs shall be taxed by the registrar in person"

respect of the particular matters out of which such charges arise, has been duly sanctioned.

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"(4.) Every such person shall, on request by the trustee (which request the trustee shall make a sufficient time before declaring a dividend), deliver his bill of costs or charges to the proper officer for taxation, and if he fails to do so within seven days after receipt of the request, or such further time as the Court, on application, may grant, the trustee shall declare and distribute the dividend without regard to any claim by him, and thereupon any such claim shall be forfeited as well against the trustee personally as against the estate."

Receipts, Payments, Accounts, Audit.]—The following are the sections of the Act relating to receipts, payments, accounts and audit:—

Receipts, payments, &c.

Sect. 74. "(1.) An account, called the Bankruptcy Estates Account, shall be kept by the Board of Trade with the Bank of England, and all moneys received by the Board of Trade in respect of proceedings under this Act shall be paid to that account.

Payment of money into Bank of England.

"(2.) The account of the accountant in bankruptcy at the Bank of England shall be transferred to the Bankruptcy Estates Account.

"(3.) Every *trustee* shall, in such manner and at such times as the Board of Trade with the concurrence of the Treasury direct, pay the money received by him to the Bankruptcy Estates Account at the Bank of England, and the Board of Trade shall furnish him with a certificate of receipt of the money so paid.

"(4.) Provided that if it appears to the committee of inspection that for the purpose of carrying on the debtor's business, or of obtaining advances, or because of the probable amount of the cash balance, or if the committee shall satisfy the Board of Trade that for any other reason it is for the advantage of the creditors that the trustee should have an account with a local bank, the Board of Trade shall, on the application of the committee of inspection, authorise the trustee to make his payments into and out of such local bank as the committee may select (*i*).

(*i*) By rule 228 it is provided that "Application by a committee of inspection for authority to the trustee to make his payments into and out of a local bank shall be in Form No. 91 in the Appendix, and the authority shall be in Form No. 92 in the Appendix, with such variations as circumstances may require." Every such application requires a stamp of 1*l*. See scale of fees, Table B.

Authority for account at local bank.

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"Such account shall be opened and kept by the trustee in the name of the debtor's estate; and any interest receivable in respect of the account shall be part of the assets of the estate.

"The trustee shall make his payments into and out of such local bank in the prescribed manner.

"(5.) Subject to any general rules relating to small bankruptcies under Part VII. of this Act, where the debtor at the date of the receiving order has an account at a bank, such account shall not be withdrawn until the expiration of seven days from the day appointed for the first meeting of creditors, unless the Board of Trade, for the safety of the account, or other sufficient cause, order the withdrawal of the account.

"(6.) If a trustee at any time retains for more than ten days a sum exceeding fifty pounds, or such other amount as the Board of Trade in any particular case authorise him to retain, then, unless he explains the retention to the satisfaction of the Board of Trade, he shall pay interest on the amount so retained in excess at the rate of twenty pounds per centum per annum, and shall have no claim for remuneration, and may be removed from his office by the Board of Trade, and shall be liable to pay any expenses occasioned by reason of his default (*k*).

"(7.) All payments out of money standing to the credit of the Board of Trade in the Bankruptcy Estates Account shall be made by the Bank of England in the prescribed manner" (*l*).

Trustee not to pay into private account.

Sect. 75. "No trustee in a bankruptcy or under any composition or scheme of arrangement shall pay any sums received by him as trustee into his private banking account."

Investment of surplus funds.

Sect. 76. "(1.) Whenever the cash balance standing to the credit of the Bankruptcy Estates Account is in excess of the

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Local bank.

By rule 251, "Where the trustee is authorised to have an account at a local bank, he shall forthwith pay all moneys received by him in to the credit of the estate. All payments out shall be made by cheque payable to order, and every cheque shall have marked or written on the face of it the name of the estate, and shall be signed by the trustee, and countersigned by such person as the creditors or the committee of inspection may appoint."

Several trustees.

(*k*) Under the corresponding provision of the stat. 6 Geo. 4, c. 16, s. 104, it was held that where there were two assignees, both would not be charged with twenty per cent. where only one had the money, unless it appeared that the other knowingly permitted it: *Ex parte Benham*, 2 Mont. & A. 272. The same principle would probably apply to the case of several trustees.

Payments out of Bank of England.

(*l*) By rule 252, "All payments out of the Bankruptcy Estates Account shall be made by cheques to order, signed by such officers of the Board of Trade as the Board may from time to time appoint."

amount which in the opinion of the Board of Trade is required for the time being to answer demands in respect of bankrupts' estates, the Board of Trade shall notify the same to the Treasury, and shall pay over the same or any part thereof as the Treasury may require to the Treasury, to such account as the Treasury may direct, and the Treasury may invest the said sums or any part thereof in government securities to be placed to the credit of the said account. **Winding-up Estate under Statutory Compositions, &c.**

"(2.) Whenever any part of the money so invested is, in the opinion of the Board of Trade, required to answer any demands in respect of bankrupts' estates, the Board of Trade shall notify to the Treasury the amount so required, and the Treasury shall thereupon repay to the Board of Trade such sum as may be required to the credit of the Bankruptcy Estates Account, and for that purpose may direct the sale of such part of the said securities as may be necessary.

"(3.) The dividends on the investments under this section shall be paid to such account as the Treasury may direct, and regard shall be had to the amount thus derived in fixing the fees payable in respect of bankruptcy proceedings."

Sect. 77. "The Treasury may from time to time issue to the Board of Trade in aid of the votes of Parliament, out of the receipts arising from fees, fee stamps, and dividends on investments under this Act, any sums which may be necessary to meet the charges estimated by the Board of Trade in respect of salaries and expenses under this Act." Certain receipts and fees to be applied in aid of expenditure.

Sect. 78. "(1.) Every trustee shall, at such times as may be prescribed, but not less than twice in each year during his tenure of office, send to the Board of Trade, or as they direct, an account of his receipts and payments as such trustee. Audit of trustee's accounts.

"(2.) The account shall be in a prescribed form, shall be made in duplicate, and shall be verified by a statutory declaration in the prescribed form (*m*).

(*m*) With regard to the audit of trustee's accounts it is provided by rule 211, that—"Every trustee shall, at the expiration of six months from the date of the receiving order, and at the expiration of every succeeding six months thereafter until his release, transmit to the Board of Trade a duplicate copy of the cash-book for such period, together with the necessary vouchers and copies of the certificates of audit by the committee of inspection. He shall also forward with the first accounts a summary of the debtor's statement of affiairs, in such form as the Board of Trade may direct, showing thereon in red ink the amounts realized, and explaining the cause of the non-realization of such assets as may be unrealized.

"When the estate has been fully realized the trustee shall

Winding-up Estate under Statutory Compositions, &c.

"(3.) The Board of Trade shall cause the accounts so sent to be audited, and for the purposes of the audit the trustee shall furnish the Board with such vouchers (*n*) and information as the Board may require, and the Board may at any time require the production of and inspect any books or accounts kept by the trustee.

"(4.) When any such account has been audited one copy thereof shall be filed and kept by the Board, and the other copy shall be filed with the Court, and each copy shall be open to the inspection of any creditor, or of the *compounding or arranging debtor*, or of any person interested" (*o*).

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forthwith send in his accounts to the Board of Trade, although the six months may not have expired.

"The accounts sent in by the trustee shall be certified and verified by him according to the Form No. 83 in the Appendix."

For forms relating to the audit of trustees' accounts, see Forms 82—87, in Appendix, *post*, pp. 485—488.

(*n*) This general rule will not apply where the nature of the case renders it impossible that details of the sums expended should be furnished in vouchers produced. Thus, where the bankrupt was a farmer, and his assignee, also a farmer, carried on the bankrupt's farm for the benefit of the estate and used his own stock and implements (there being none of the bankrupt's) in so doing, and claimed a gross sum for the cost of management, but furnished no detailed account, and produced no vouchers, the Court being satisfied that the money had been actually expended, allowed the assignee the sum which the evidence in opposition to his claim showed to be a reasonable sum: *Ex parte Jackson, Re Kersey*, 15 W. R. 947.

Copy accounts to be filed.

(*o*) By rule 212, "When the trustee's account has been audited, the Board of Trade shall certify that the account has been duly passed, and thereupon the duplicate copy, bearing a like certificate, shall be transmitted to the registrar of the Court, who shall file the same with the proceedings in the bankruptcy," or, presumably, composition or arrangement.

Creditor may obtain copy of trustee's accounts.

Rule 230. "Any creditor who has proved, may apply to the trustee for a copy of the accounts (or any part thereof) relating to the estate as shown by the cash-book up to date, and on paying for the same at the rate of threepence per folio of seventy-two words (each figure counting as one word), he shall be entitled to have such copy accordingly."

Affidavit of no receipts.

Rule 213. "Where a trustee has not since the date of his appointment or since the last audit of his accounts, as the case may be, received or paid any sum of money on account of the debtor's estate, he shall, at the period when he is required to transmit his estate account to the Board of Trade, forward to the Board an affidavit of no receipts or payments."

Annual returns.

Rule 217. "Every trustee shall, within one month after the 31st day of December in each year, transmit to the Board of Trade a statement according to the form in the Appendix of every bankruptcy matter in which he is a trustee." The form referred to here is Form 84. See *post*, p. 486.

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Sect. 79. "The trustee shall, whenever required by any creditor so to do, and on payment by such creditor of the prescribed fee, furnish and transmit to such creditor by post a list of the creditors, showing in such list the amount of the debt due to each of such creditors" (*p*). The trustee to furnish list of creditors.

Sect. 80. "The trustee shall keep, in manner prescribed, proper books, in which he shall from time to time cause to be made entries or minutes of proceedings at meetings, and of such other matters as may be prescribed, and any creditor of the *compounding or arranging debtor* may, subject to the control of the Court, personally or by his agent inspect any such books" (*q*). Books to be kept by trustee.

(*p*) Rule 231 provides that, "In the case mentioned in sect. 79 of the Act, the fee shall be calculated at the same rate as in the last preceding rule mentioned;" *i. e.* at the rate of 3*d.* per folio of seventy-two words.

(*q*) But a creditor will not be allowed to inspect the proceedings for the purpose of enabling him to impeach the validity of the receiving order. See *Ex parte Rimall*, 1 De G., M. & G. 491.

It is to be presumed that by "any creditor" in this section is meant any creditor who has proved his debt. See *Ex parte Kenrick*, 7 L. T., N. S. 287.

With regard to the books to be kept by trustees the rules provide as follows:—

Record book.

Rule 207. "The official receiver, until a trustee is appointed, and thereafter the trustee, shall keep a book, to be called the 'record book,' in which he shall record all minutes, all proceedings had, and resolutions passed at any meeting of creditors, or of the committee of inspection, and all such matters as may be necessary to give a correct view of his administration of the estate, but he shall not be bound to insert in the record any document of a confidential nature (such as the opinion of counsel on any matter affecting the interest of the creditors), nor need he exhibit such document to any person other than a member of the committee of inspection.

Cash book.

Rule 208. "The official receiver, until a trustee is appointed, and thereafter the trustee, shall keep a book to be called the 'cash book' (which shall be in such form as the Board of Trade may from time to time direct), in which he shall (subject to the provisions of these rules as to trading accounts) enter from day to day the receipts and payments made by him.

Books to be submitted to committee of inspection.

Rule 209. "The trustee shall submit the record book and cash book, together with any other requisite books and vouchers, to the committee of inspection (if any) when required, and not less than once every three months.

Audit of cash book.

Rule 210. "The committee of inspection shall not less than once every three months audit the cash book, and certify therein under their hands the day on which the said book was audited. The certificate shall be in the Form No. 82 in the Appendix (*post*, p. 485), with such variations as circumstances may require."

Trustee carrying on business.

Rule 225. "(1) Where the trustee carries on the business of the debtor, he shall keep a distinct account of the trading, and

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Sect. 81. "(1.) Every *trustee* shall from time to time as may be prescribed, and not less than once in every year during the continuance of the *composition or scheme of arrangement*, transmit to the Board of Trade a statement showing the proceedings in the *composition or scheme of arrangement* up to the date of the statement, containing the prescribed particulars, and made out in the prescribed form.

Annual statement of proceedings.

"(2.) The Board of Trade shall cause the statements so transmitted to be examined, and shall call the trustee to account for any misfeasance, neglect or omission which may appear on the said statements or in his accounts or otherwise, and may require the trustee to make good any loss which the estate of the *compounding or arranging debtor* may have sustained by the misfeasance, neglect, or omission."

Release of trustee.

Sect. 82. "(1.) When the trustee has realised all the property of the *compounding or arranging debtor*, or so much thereof as can, in his opinion, be realised without needlessly protracting the trusteeship, and distributed a final dividend, if any, [or has ceased to act by reason of a composition having been approved (*q*),] or has resigned, or has been removed from his office, the Board of Trade shall, on his application (*r*), cause a report on his accounts to be prepared, and, on his complying with all the requirements of the Board, shall take into consideration the report, and any objection which may be urged by any creditor or person interested against the release of the trustee, and shall either grant or withhold the release accordingly, subject nevertheless to an appeal to the High Court.

"(2.) Where the release of a trustee is withheld the Court may, on the application of any creditor or person interested, make such order as it thinks just, charging the trustee with the

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shall incorporate in the cash book the total weekly amount of the receipts and payments on such trading account.

"(2) The trading account shall from time to time and not less than once in every month be verified by affidavit, and the trustee shall thereupon submit such account to the committee of inspection (if any) or such member thereof as may be appointed by the committee for that purpose, who shall examine and certify the same."

(*q*) The words in brackets evidently apply only to a trustee in bankruptcy; the remainder of the section apparently applies to a composition or scheme subject to the terms of the arrangement.

Notice of application for release.

(*r*) By rule 226, "A trustee, before making application to the Board of Trade for his release, shall give notice of his intention so to do, according to the Form No. 93 in the Appendix, to all the creditors of the debtor who have proved their debts, and shall send with such notice a summary of his receipts and payments as trustee." For form of application to the Board of Trade, see Form 94 in Appendix, *post*, p. 489.

consequences of any act or default he may have done or made contrary to his duty.

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"(3.) An order of the Board releasing the trustee shall discharge him from all liability in respect of any act done or default made by him in the administration of the affairs of the *compounding or arranging debtor*, or otherwise in relation to his conduct as trustee, but any such order may be revoked on proof that it was obtained by fraud or by suppression or concealment of any material fact (*s*).

"(4.) Where the trustee has not previously resigned or been removed, his release shall operate as a removal of him from his office, and thereupon the official receiver shall be the trustee."

Official name of trustee.

Sect. 83. "The trustee may sue (*t*) and be sued by the official name of 'the trustee of the property of ———, a *compounding or arranging debtor*,' inserting the name of the *compounding or arranging debtor*, and by that name may in any part of the British dominions or elsewhere hold property of every description, make contracts, sue and be sued, enter into any engagements binding on himself and his successors in office, and do all other acts necessary or expedient to be done in the execution of his office."

Power to appoint joint or successive trustees.

Sect. 84. "(1.) The creditors may, if they think fit, appoint more persons than one to the office of trustee, and when more persons than one are appointed they shall declare whether any act required or authorized to be done by the trustee is to be done by all or any one or more of such persons, but all such persons are in this Act included under the term 'trustee,' and shall be joint-tenants of the property of the *compounding or arranging debtor* (*u*).

(*s*) Notwithstanding a release the Court has jurisdiction over a trustee to compel him to pay a dividend if he has assets in his hands: *Ex parte Société Cockrill*, 3 Ch. D. 115; but not so, if the assets have been distributed: *Ex parte Carter, Re Ware*, 8 Ch. D. 731.

(*t*) See also sect. 57, *post*, p. 458. It seems that if the trustee is sued or sues under his official title his own name should not appear at all; but a trustee in bankruptcy may also sue in his own name: *Leeming* v. *Lady Murray*, 13 Ch. D. 123.

Liability of trustee for acts of co-trustees.

(*u*) Where an assignee having sole charge of paying the dividends, misapplied moneys received by him for that purpose, it was held that his co-assignees were liable, and that whatever arrangements the assignees might make with each other for their own convenience, they were all jointly liable to the bankrupt's creditors for the due payment of their dividends: *Ex parte Winnall*, 3 Dea. & C. 22. See also *Ex parte Booth*, Mont. 248. But see *Primrose* v. *Bromley*, where Lord *Hardwicke*, C., observed that assignees "are to be considered in this Court as mere trustees, and each separately answerable only for what they

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"(2.) The creditors may also appoint persons to act as trustees in succession in the event of one or more of the persons first named declining to accept the office of trustee, or failing to give security (*x*), or not being approved of by the Board of Trade" (*y*).

Office of trustee vacated by insolvency.

Sect. 85. "If a receiving order is made against a trustee he shall thereby vacate his office of trustee" (*z*).

Removal of trustee.

Sect. 86. "(1.) The creditors may, by ordinary resolution (*a*), at a meeting specially called for that purpose, of which seven days' notice has been given, remove a trustee appointed by them, and may at the same or any subsequent meeting appoint another

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receive, and it would be a dangerous consequence to hold them otherwise:" 1 Atk. at p. 89. An assignee was held liable to contribute to reimburse his co-assignee, who had paid the whole of a loss occasioned by their joint act, notwithstanding that the co-assignee had taken himself the whole management of the business which occasioned the loss: *Lingard* v. *Bromley*, 1 V. & B. 114.

(*x*) By rule 253 it is provided that in the case of a trustee or special manager the following rules as to security shall be observed, namely:—

"(1.) The security shall be given to such officers or persons and in such manner as the Board of Trade may from time to time direct.

"(2.) It shall not be necessary that security shall be given in each separate matter; but security may be given either specially in a particular matter or generally to be available for any matter in which the person giving security may be appointed either as trustee or special manager.

"(3.) The Board of Trade shall fix the amount and nature of such security, and may from time to time as they think fit either increase or diminish the amount of standing security which any such person is required to give."

Notification of objection to High Court.

(*y*) Rule 220 provides as follows:—"(1.) Where the Board of Trade objects to the appointment of a trustee, and is required by a majority in value of the creditors to notify the objection to the High Court, the requisition shall be in Form No. 70 in the Appendix, with such variations as circumstances may require. On receipt of such requisition the Board of Trade shall forthwith transmit a copy thereof to the senior registrar in bankruptcy of the High Court, who shall fix a time for the hearing of the matter. At the hearing the person objected to, and every creditor and the Board of Trade, shall be entitled to be heard.

"(2.) The Board of Trade may also with the copy requisition communicate to the Court the grounds of its objections. Any report so made by the Board of Trade shall be *primâ facie* evidence of statements therein contained."

(*z*) As to the circumstances under which a receiving order may be made, see *ante*, p. 390.

(*a*) As to what is an ordinary resolution, see *ante*, p. 416. As to what votes will not be counted on a resolution affecting the conduct of the trustee, see sect. 88, *post*, p. 428.

person to fill the vacancy as hereinafter provided in case of a vacancy in the office of trustee.

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"(2.) If the Board of Trade are of opinion that a trustee appointed by the creditors is guilty of misconduct, or fails to perform his duties under this Act, the Board may remove him from his office, but if the creditors, by ordinary resolution, disapprove of his removal, he or they may appeal against it to the High Court" (*b*).

Sect. 87. "(1.) If a vacancy occurs in the office of a trustee (*c*), the creditors in general meeting may appoint a person to fill the vacancy, and thereupon the same proceedings shall be taken as in the case of a first appointment (*d*).

"(2.) The official receiver shall, on the requisition of any creditor, summon a meeting for the purpose of filling such vacancy.

"(3.) If the creditors do not within three weeks after the occurrence of a vacancy, appoint a person to fill the vacancy, the official receiver shall report the matter to the Board of Trade,

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(*b*) By rule 227, "Where one-fourth in value of the creditors desire that a general meeting of the creditors may be summoned to consider the propriety of removing the trustee, such meeting may be summoned by a member of the committee of inspection, or by the official receiver, on the deposit of a sum sufficient to defray the expenses of summoning such meeting."

Appeal from Board of Trade to High Court.

By sect. 139 it is provided that, "Where by this Act an appeal to the High Court is given against any decision of the Board of Trade, or of the official receiver, the appeal shall be brought within twenty-one days from the time when the decision appealed against is pronounced or made." It is to be observed that the appeal is in every case to be to the High Court of Justice, even though the proceedings may have been instituted in a County Court.

It was held that a trustee in bankruptcy could be removed by the Court under sect. 83, sub-sect. (4), of the Act of 1869, only upon good cause shown, not at the mere discretion of the registrar; but that where the registrar came to the conclusion that sufficient cause had been shown, the Court would not interfere with his judicial discretion properly exercised according to law: *Ex parte Sheard, Re Pooley*, 16 Ch. D. 107.

Notice of resignation.

(*c*) A trustee may tender his resignation: see sect. 82 (1), (4), *ante*, pp. 424, 425; but by rule 223 it is provided that "A trustee intending to resign his office shall call a meeting of creditors to consider whether his resignation shall be accepted or not, and shall give not less than seven days' notice of the meeting to the official receiver."

(*d*) The proceedings to be taken in the case of a first appointment of a trustee in bankruptcy, are laid down in sect. 21 of the Act, *post*, p. 456, note (*l*).

By sect. 143, "(2) No defect or irregularity in the appointment or election of a trustee shall vitiate any act done by him in good faith."

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and the board may appoint a trustee; but in such case the creditors or committee of inspection shall have the same power of appointing a trustee as in the case of a first appointment.

"(4.) During any vacancy in the office of trustee the official receiver shall act as trustee."

Limitation of voting powers of trustee.

Sect. 88. "The vote of the trustee, or of his partner, clerk, solicitor, or solicitor's clerk, either as creditor or as proxy for a creditor, shall not be reckoned in the majority required for passing any resolution affecting the remuneration or conduct of the trustee."

Discretionary powers of trustee and control thereof.

Sect. 89. "(1.) Subject to the provisions of this Act the trustee shall, in the administration of the property of the *compounding or arranging debtor* and in the distribution thereof amongst his creditors, have regard to any directions that may be given by resolution of the creditors at any general meeting, or by the committee of inspection, and any directions so given by the creditors at any general meeting shall in case of conflict be deemed to override any directions given by the committee of inspection (*f*).

"(2.) The trustee may from time to time summon general meetings of the creditors for the purpose of ascertaining their wishes, and it shall be his duty to summon meetings at such times as the creditors, by resolution, either at the meeting appointing the trustee or otherwise may direct, or whenever requested in writing to do so by one-fourth in value of the creditors.

"(3.) The trustee may apply to the Court in manner prescribed for directions in relation to any particular matter arising under the *composition or scheme of arrangement.*

"(4.) Subject to the provisions of this Act (*g*) the trustee shall

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(*f*) "Have regard to," does not mean "obey." Where a trustee considers the directions of the majority of the creditors are not given *bonâ fide*, with a view of administering the estate in the best way for the benefit of the creditors generally, but with a view of favouring the debtor or persons whom he has fraudulently preferred, the trustee should apply to the Court for directions, and the Court, even though there may have been no fraud in passing the resolutions, may direct the trustee to disregard the resolutions: *Ex parte Cocks, Re Poole*, 21 Ch. D. 397. See also *Ex parte Strawbridge, Re Hickman*, 25 Ch. D. 266.

Application for directions

Rule 229 provides that "Where a trustee desires to apply to the Court for directions in any matter, he may file an application in the Form No. 74 in the Appendix. The Court shall then hear the application, or fix a day for hearing it, and direct the trustees to apply by motion."

(*g*) The rules and principles to be observed by the trustee in distributing the debtor's estate are contained in sects. 58—62, inclusive, and in sect. 65, *post*, p. 461 *et seq.*

use his own discretion in the management of the estate and its distribution among the creditors."

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Sect. 90. "If the *compounding or arranging debtor* or any of the creditors, or any other person, is aggrieved (*h*) by any act or decision of the trustee, he may apply to the Court, and the Court may confirm, reverse, or modify the act or decision complained of, and make such order in the premises as it thinks just."

Appeal to Court against trustee.

Sect. 91. "(1.) The Board of Trade shall take cognizance of the conduct of trustees, and in the event of any trustee not faithfully performing his duties, and duly observing all the requirements imposed on him by statute, rules or otherwise, with respect to the performance of his duties, or in the event of any complaint being made to the Board by any creditor in regard thereto, the Board shall inquire into the matter and take such action thereon as may be deemed expedient.

Control of Board of Trade over trustees.

"(2.) The Board may at any time require any trustee to answer any inquiry made by them in relation to any *composition or scheme of arrangement* in which the trustee is engaged, and may, if the Board think fit, apply to the Court to examine on oath the trustee or any other person concerning the *composition or scheme of arrangement* (*i*).

"(3.) The Board may also direct a local investigation to be made of the books and vouchers of the trustee."

Administration of Property—Proof of Debts.]— Part III. of the Bankruptcy Act, 1883, deals with the mode in which property is to be administered under the Act (*k*).

Administration of property.

Proof of debts.

(*h*) As to who are persons aggrieved see *Ex parte Walter, Re Webb*, 2 Ch. D. 326; *Ex parte Ellis*, 2 Ch. D. 797; *Ex parte Sidebotham*, 14 Ch. D. 465; *Ex parte Merriman, Re Stenson*, 25 Ch. D. 147.

(*i*) By sect. 102, sub-sect. (5), it is provided that "Where default is made by a trustee, debtor, or other person in obeying any order or direction given by the Board of Trade or by an official receiver or any other officer of the Board of Trade under any power conferred by this Act, the Court may, on the application of the Board of Trade or an official receiver or other duly authorized person order such defaulting trustee, debtor, or person to comply with the order or direction so given; and the Court may also, if it shall think fit, upon any such application make an immediate order for the committal of such defaulting trustee, debtor, or other person; provided that the power given by this sub-section shall be deemed to be in addition to and not in substitution for any other right or remedy in respect of such default."

(*k*) The substituted expressions, "trustee," "composition or

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Sect. 37. "(1.) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, shall not be provable *under a composition or scheme of arrangement* (*l*).

Description of debts provable *under a composition or scheme of arrangement.*

"(2.) A person having notice of any act of bankruptcy (*m*)

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scheme of arrangement," "compounding or arranging debtor," and "order approving the composition or scheme," are printed in italics. It must, however, be borne in mind, that the application to compositions and schemes of arrangement of Part III. of the Act is not unqualified, but extends only so far as the nature of the case and the terms of the composition or scheme admit. See *ante*, p. 416.

Unliquidated damages.

(*l*) The first sub-section is identical with the first clause of sect. 31 of the Bankruptcy Act, 1869, with the addition of the words "or breach of trust." The meaning of the words "by reason of a contract or promise" (which occurred in the Bankruptcy Act, 1861), was considered in the case of *Johnson* v. *Skafte*, L. R., 4 Q. B. 700, in which it was held that the enactment applied only to express contracts, and did not apply to liabilities arising out of the relation of parties from which the law implies a contract, such as a claim for damages caused by a distress levied on the goods of an under-tenant by the superior landlord for rent which the mesne tenant had failed to pay. But there can be no doubt that such a claim would now be provable under the very extensive definition of liability given in sub-sect. 8 of this section, *infra*, p. 434.

It would seem that damages in action of tort will not be provable unless judgment is signed before the date of the receiving order. See *Ex parte Brooke, Re Newman*, 3 Ch. D. 494. And if a creditor elects to proceed at law for a tort, he cannot receive a composition in respect of the balance which he may fail to recover in the action: *Ex parte Baum, Re Edwards*, L. R., 9 Ch. A. 673. Costs of a successful defendant in an action founded on contract, untaxed at the date of adjudication, have been held to be provable: *Ex parte Peacock, Re Duffield*, L. R., 8 Ch. A. 682.

The following claims for unliquidated damages have been held to be provable as arising by reason of contracts: (i) for fraudulent misrepresentation on sale of chattels: *Jack* v. *Kipping*, 9 Q. B. D. 113; (see further as to misrepresentation, *Ex parte Adamson, Re Collie*, 8 Ch. D. 807; *Watson* v. *Holliday*, 20 Ch. D. 780;) (ii) for secret profits made by an agent of a company: *Emma Silver Mining Co.* v. *Grant*, 17 Ch. D. 122.

Available act of bankruptcy.

(*m*) As to what are acts of bankruptcy, see *ante*, p. 383. "'An available act of bankruptcy' means any act of bankruptcy available for a bankruptcy petition at the date of the presentation of the petition on which the receiving order is made:" sect. 168. The act of bankruptcy must have occurred within three months before the presentation of the petition: see sect. 6, sub-sect. 1 (c), *ante*, p. 393. The words "available for adjudication" in

available against the debtor shall not prove under the order (*n*) for any debt or liability contracted by the debtor subsequently to the date of his so having notice.

"(3.) Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge (*o*) by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable (*p*).

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the Act of 1869, were held to mean available for the making of the particular adjudication under which the proof was tendered: *Ex parte Crosbie, Re Bedell*, 7 Ch. D. 123.

Notice. Notice may be actual or constructive. "A person may be proved to have had notice that an act of bankruptcy has been committed, either by proof that he had received formal notice that an act of bankruptcy had been committed, or by proof that he knew facts which were sufficient to inform him that an act of bankruptcy had been committed:" per *Mellish*, L. J., in *Ex parte Snowball*, L. R., 7 Ch. A. at p. 549. See further, as to what will amount to constructive notice of an act of bankruptcy, *Lucas* v. *Dicker*, 6 Q. B. D. 84, and see Baldwin on Bankruptcy, 182. See as to notice generally, *post*, tit. MORTGAGES.

(*n*) By "the order" is presumably meant the receiving order.

(*o*) In the Act of 1869 the corresponding expression is "during the continuance of the bankruptcy."

Right of proof. (*p*) The tendency of legislation has been to extend the right of proof, and almost every kind of debt and liability is included in the present enactment. With respect to the similar provision in the Act of 1869, sect. 31, *James*, L. J., observed: "Every possible demand, every possible claim, every possible liability, except for personal torts, is to be the subject of proof in bankruptcy, and to be ascertained either by the Court itself or with the aid of a jury. The broad purview of this Act is, that the bankrupt is to be a freed man—freed not only from debts, but from contracts, liabilities, engagements, and contingencies of every kind. On the other hand, all the persons from whose claims and from liability to whom he is so freed are to come in with the other creditors, and share in the distribution of the assets:" *Ex parte Llynvi Coal, &c. Co.*, L. R., 7 Ch. A., at p. 31. It is, however, to be observed, that the power to order that the value of a debt or liability shall be assessed by a jury is omitted from the present Act. See sect. 37 (7), *post*, p. 434.

Proof by corporations. *Who are the proper persons to prove.*]—A corporation may prove by any of its officers authorised in that behalf by the seal of the corporation: see sect. 148; but the person so authorised must state his authority and means of knowledge. See sched. 2, rule 3, *post*, p. 436. For form of proof by agent of a company, see Form 53 in Appendix, *post*, p. 474, stating the character in which he acts. The liquidator of a company in course of winding up may prove and appoint proxies: *Ex parte Taylor, Re Pooley*, 25 W. R. 641; *S. C.*, 36 L. T. 679. He may

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"(4.) An estimate shall be made by the trustee of the value of any debt or liability provable as aforesaid, which by reason of

prove against a shareholder for the estimated amount of future calls to the amount unpaid on his shares: *Ex parte Pickering*, L. R., 4 Ch. A. 58. In *Fardoonjee's case*, 3 Ch. D. 264, where shares not fully paid up in an English company were taken by a resident at Bombay who became insolvent, *Bacon*, V.-C., held the liability of the insolvent to future calls in respect of shares not fully paid up was not provable, and consequently was not barred by the order of discharge, but that decision apparently turned on the operation of the Indian Insolvency Act, and is not of general application. *Chitty*, J., held that such a liability was provable in a liquidation under the Act of 1869: *Re Mercantile Mutual Marine Insurance Co.*, 25 Ch. D. 415. See Lindley on Partnership, 4th ed., vol. 2, p. 1180.

Partners. A firm may prove by any of its members: see sect. 148; and *Ex parte Hodgkinson*, 19 Ves. 293.

Lunatics. A lunatic may prove by his committee or *curator bonis:* see sect. 148. Formerly such person could not, without the sanction of the Court of Lunacy, appoint a proxy to vote on behalf of the lunatic or waive any of his rights against the debtor's estate: *Ex parte Wood*, *Re Wright* 10 Ch. D. 554. But now the committee or *curator bonis* may act on behalf of the lunatic "for *all* purposes of the Act:" see sect. 148. Where a lunatic is not so found by inquisition his guardian *ad litem* is the person to prove on his behalf: see *Ex parte Hare*, *Re England*, L. R., 10 Ch. A., per *James*, L. J., at p. 222. Where a creditor was disabled by age and imbecility, it was held that the commissioners might admit proof of his claim upon such evidence as they might deem satisfactory: *Ex parte Clarke*, *Re Waugh*, 2 Russ. 575. The mother of a creditor of weak intellect was permitted to prove on his behalf: *Ex parte Oxtoby*, De G. 453.

Married women. The right of married women to prove depends on the same considerations as her right to present a petition, as to which see *ante*, p. 393.

Infants. A guardian of an infant may prove on his behalf: *Ex parte Belton*, 1 Atk. 251. It was held that, under the Act of 1869, the infant might enforce payment of his debts by a debtor's summons in his own name, and proceedings in bankruptcy based thereon in his own name: see *Ex parte Brocklebank* 6 Ch. D. 358.

Trustees. As a general rule all the trustees ought to join in proving a debt due to the trust estate: *Ex parte Phillips*, *Re Wright*, 2 Dea. 334. A bare trustee for an absolute beneficial owner cannot prove without the concurrence of the *cestui que trust* if *sui juris;* but this rule does not apply to trustees for persons under disability: *Ex parte Culley*, *Re Adams*, 9 Ch. D. 307. See also *Ex parte Dearle*, *Re Hastings*, W. N. 1884, p. 231.

Executors. An executor or administrator is the proper person to prove a debt due to a deceased creditor: *Re English*, 2 Bro. C. C. 609; *Ex parte Colman*, 2 D. & C. 584; *Ex parte Bridges*, 4 Madd. 269.

its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value (*q*). **Winding-up Estate under Statutory Compositions, &c.**

"(5.) Any person aggrieved by any estimate made by the trustee as aforesaid may appeal to the Court.

And one of several executors may prove: *Ex parte Phillips*, 2 Dea. 334; *Ex parte Brown*, 1 D. & C. 118.

An assignee of a chose in action may either prove in his own name, *Ex parte Cooper*, L. R., 20 Eq. 782, or require his assignor to prove on his behalf: *Ex parte Dickenson*, 2 D. & C. 520. And see Jud. Act, 1873, s. 25 (6). Assignees.

The trustee may prove in respect of any debt due to a bankrupt: sect. 56 (3) *post*, p. 457. It is well, however, that the debtor, as the case may be, should join in the affidavit of proof: *Re Robson*, 2 M., D. & De G. 65. Bankruptcy trustees.

A foreigner may prove in our Courts for a debt due to him. Where a creditor was an alien enemy, his claim was admitted, reserving the dividends: *Ex parte Boussmaker*, 17 Ves. 71. In the case of proof of a debt arising out of a foreign contract, the contract will be governed by the *lex loci contractûs*, and the remedy by the *lex fori*: *De la Vega* v. *Vianna*, 1 B. & Ad. 284. See also *Ex parte Melbourn*, L. R., 6 Ch. A. 64. Foreigners.

It has been held that a barrister may prove for his fees against a solicitor who has actually received them from the client before his bankruptcy: *Re Hall*, 2 Jur., N. S. 1076; but a barrister has no remedy against the client: *Kennedy* v. *Brown*, 13 C. B., N. S. 677; *Mostyn* v. *Mostyn*, L. R., 5 Ch. A. 457. Counsel's fees.

A solicitor may tender a proof in respect of costs due to him from a client: *Ex parte Peacock, Re Duffield*, L. R., 8 Ch. A. 682. The amount due may be determined by the registrar: *Ex parte Ditton, Re Woods*, 13 C. D. 318. As to costs fixed by agreement between solicitors and their clients, see stat. 33 & 34 Vict. c. 28. See also *Ex parte Webb*, 4 De G. & Sm. 366; and Baldwin on Bankruptcy, 292. Costs.

An award of a sum to one of the parties to an arbitration creates a debt provable in bankruptcy: *Antram* v. *Chace*, 15 East, 208. See also *Ex parte Harding*, 5 De G., M. & G. 367; *Ex parte Tate*, 43 L. J., Bank. 102. Award.

In the case of a submission by bond, if a party fails to perform the award, the penalty is a debt at law till the award is set aside and so provable: *Ex parte Lingood*, 1 Atk. at p. 241.

As to proof by apprentices for fees, see *post*, p. 444.

As to secured creditors, see *post*, pp. 437, 438. Particular debts.

As to proof in respect of composition dividends, see Rule 164, *ante*, p. 414.

See further as to proof in respect of particular debts, Robson on Bankruptcy, Chap. xiii.

(*q*) For the purposes of the estimate such future or contingent debts and liabilities of a debtor are to be valued in the best way possible, and when the value has been ascertained the sum so assessed is to be provable as a debt; both parties, the creditor and the trustee, taking the proof for better or for worse; see *Ex parte Bates, Re Pannell*, 16 Ch. D. 914. Contingent debts.

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"(6.) If, in the opinion of the Court, the value of the debt or liability is incapable of being fairly estimated, the Court may make an order to that effect, and thereupon the debt or liability shall, for the purposes of this Act, be deemed to be a debt not provable *under a composition or scheme of arrangement* (*r*).

"(7.) If, in the opinion of the Court, the value of the debt or liability is capable of being fairly estimated, the Court may direct the value to be assessed, before the Court itself without the intervention of a jury, and may give all necessary directions for this purpose, and the amount of the value when assessed shall be deemed to be a debt provable *under a composition or scheme of arrangement* (*r*).

"(8.) 'Liability' shall for the purposes of this Act include any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring before the discharge of the debtor, and generally it shall include any express or implied engagement, agreement, or undertaking, to pay, or capable of resulting in the payment of money, or money's worth, whether the payment is, as respects amount fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules, or as matter of opinion"(*s*).

Annuity.

(*r*) A simple life annuity is of course capable of being estimated: *Ex parte Naden, Re Wood*, L. R., 7 Ch. A. 670; so also an annuity, *durante viduitate*: *Ex parte Blakemore*, 5 Ch. D. 372; and an annuity under a separation deed determinable on the lady leading an unchaste life, or becoming entitled to property independently of her husband: *Ex parte Neale, Re Batey*, 14 Ch. D. 579; also an annuity determinable on breach of covenant (contained in a deed of dissolution of a partnership), not to carry on a particular business in a particular locality: *Ex parte Jackson*, 20 W. R. 1023; *S. C.*, 27 L. T., N. S. 696. In *Ex parte Blakemore*, it was arranged that it should be referred to an actuary to ascertain the value of the annuity as a simple life annuity, and to deduct from that value such a sum as he should estimate to be the proper deduction for the contingency; the valuation to be made as at the commencement of the liquidation; proof was to be admitted for the value thus ascertained.

The value of an annuity must be ascertained before the person claiming in respect of it will be allowed to vote at a meeting of creditors: *Ex parte Pearce, Re Grieves*, 13 Ch. D. 262.

(*s*) Damages for breach of a contract to supply steam power for all looms which might be put up in a weaving shed during a specified period, were held to be capable of estimation: *Ex parte*

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Mutual credit and set-off.

Sect. 38. "Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order shall be made under this Act, and any other person proving or claiming to prove a debt under such receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had at the time of giving credit to the debtor, notice of an act of bankruptcy committed by the debtor, and available against him" (*t*).

Waters, Re Hoyle, L. R., 8 Ch. A. 562. As to a covenant not revoke a will, see *Robinson* v. *Ommaney*, 23 Ch. D. 285.

Set-off.

(*t*) This section virtually re-enacts the provisions of sect. 39 of the Bankruptcy Act, 1869. The right of set-off under the Statutes of Set-off (2 Geo. 2, c. 22; 8 Geo. 2, c. 24; see also Judicature Act, 1873, 36 & 37 Vict. c. 66, sect. 24 (3)) being confined to mutual debts is far less extensive than in bankruptcy, where the right extends to mutual credits and mutual dealings. A sum payable *in futuro* may be set off against a sum payable *in præsenti*: *Ex parte Prescot*, 1 Atk. 230; *Ex parte Wagstaffe*, 13 Ves. 65. A specialty debt may be set off against a simple contract debt: *Ex parte Law*, De G. 378. A secured debt may be set off against an unsecured debt: *Ex parte Barnett, Re Deveze*, L. R., 9 Ch. A. 293.

A legal claim may be set off against one that is merely equitable: *Bailey* v. *Johnson*, L. R., 7 Ex. 263. A debt founded on contract may be set off against a debt founded on tort or fraud: *Ryall* v. *Rowles*, 1 Ves. 374.

But neither debt must be inalienable, *e. g.*, a pension under the Incumbents' Resignation Act, 1871 (34 & 35 Vict. c. 44): see *Gathercole* v. *Smith*, 17 Ch. D. 1. Also the transaction must be *mutual*, *i. e.*, between the same parties in the same right. Therefore a trustee cannot set off a debt due to an executor, as such, against a debt due from the executor himself to the compounding or arranging debtor. See *Bishop* v. *Church*, 3 Atk. 691. But where an executor had overdrawn his own personal account at a bank but had at the same bank a considerable balance to the credit of his account "as executor of Mrs. A.," to which balance he was beneficially entitled as residuary legatee of Mrs. A., it was held that he was entitled to set off the balance owing to him as executor against the overdraft: *Bailey* v. *Finch*, L. R., 7 Q. B. 34. So also a partnership debt cannot be set off against a debt owing to one partner: *Ex parte Christie*, 10 Ves. 105. But debts in different rights may by special agreement between the parties be set off against each other: *Vulliamy* v. *Noble*, 3 Mer. 618; *Cuxon* v. *Chadley*, 1 C. & P. 174; but the

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Mode of proving Debts.]—With respect to the mode of proving debts, the right of proof by secured and other creditors, the admission and rejection of proofs, and the other matters referred to in the second schedule, the rules in that schedule are to be observed. Sect. 39.

Rules as to proof of debts.

Formerly proofs of debts could only be tendered at special meetings, but these restrictions have been removed by recent legislation, and the second schedule of the Act gives to creditors increased facilities in this respect. This schedule is as follows:—

Proof in ordinary cases.

R. 1. Every creditor shall prove his debt as soon as may be after the making of a receiving order (*u*).

R. 2. A debt may be proved by delivering or sending through the post in a prepaid letter to the official receiver, or, if a trustee has been appointed, to the trustee, an affidavit verifying the debt (*x*).

R. 3. The affidavit may be made by the creditor himself, or by some person authorized by or on behalf of the creditor. If made by a person so authorized it shall state his authority and means of knowledge.

R. 4. The affidavit shall contain or refer to a statement of account showing the particulars of the debt, and shall specify the

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operation of the enactment as to set-off cannot be excluded by agreement: *Ex parte Fletcher, Re Vaughan*, 6 Ch. D. 350. It would seem that a bill or note endorsed, or a debt transferred to a debtor of a bankrupt after the commencement of the bankruptcy cannot be set off: *Marsh* v. *Chambers*, Stran. 1234; *Dickson* v. *Evans*, 6 T. R. 57. See also Baldwin on Bankruptcy, 4th ed. p. 304.

Time for lodging proof.

(*u*) By rule 170, "A proof intended to be used at the first meeting shall be lodged with the official receiver not less than one clear day before the day appointed for such meeting."

Affidavit verifying debt.

(*x*) By sect. 168, "'Affidavit' includes statutory declarations, affirmations, and attestations on honour." "A creditor's proof is to be in the Form No. 52 (see *post*, p. 474) in the Appendix: with such variations as circumstances may require:" rule 169. If any bills or other negotiable securities are held, they must be specified in the schedule to the affidavit. See note to Form 52. A creditor who holds a bill of exchange as security cannot prove his debt at the first meeting of creditors without producing the bill: *Ex parte Jacobs, Re Carter*, L. R., 17 Ex. 575. If a secured creditor votes without producing his security, his vote will be valid, but he will be deemed to have surrendered his security. See Sched. 1, r. 10, *ante*, p. 402.

A proof requires a 1*s.* stamp. See Table of Fees.

vouchers, if any, by which the same can be substantiated. The official receiver or trustee may at any time call for the production of the vouchers.

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R. 5. The affidavit shall state whether the creditor is or is not a secured creditor.

R. 6. A creditor shall bear the cost of proving his debt, unless the Court otherwise specially orders.

R. 7. Every creditor who has lodged a proof shall be entitled to see and examine the proofs of other creditors before the first meeting, and at all reasonable times.

R. 8. A creditor proving his debt shall deduct therefrom all trade discounts, but he shall not be compelled to deduct any discount, not exceeding five per centum on the net amount of his claim, which he may have agreed to allow for payment in cash (*y*).

R. 9. If a secured creditor realises his security, he may prove for the balance due to him, after deducting the net amount realised.

Proof by secured creditors (*z*).

R. 10. If a secured creditor surrenders his security to the official receiver or trustee for the general benefit of the creditors, he may prove for his whole debt.

R. 11. If a secured creditor does not either realise or surrender his security, he shall, before ranking for dividend, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed.

R. 12. (a.) Where a security is so valued the trustee may at any time redeem it on payment to the creditor of the assessed value.

(b.) If the trustee is dissatisfied with the value at which a security is assessed, he may require that the property comprised in any security so valued be offered for sale at such times and on such terms and conditions as may be agreed on between the creditor and the trustee, or as, in default of such agreement, the Court may direct (*a*). If the sale be by public auction the

(*y*) See as to trade discounts under the former law, *Ex parte Worthington, Re Cumberland*, 3 Ch. D. 803.

(*z*) As to secured creditors, see sect. 6, sub-sect. 2, *ante*, p. 393, and sched. 1, rule 10, *ante*, p. 402.

(*a*) The conduct of the sale is in the discretion of the Court, but will generally be given to the trustee: *Ex parte Smith*, 2 D. & C. 60; *Re Jordan*, 13 Q. B. D. 228; unless he is himself the mortgagee, in which case the security should be investigated and the sale conducted by an independent solicitor: *Ex parte Rolfe*, 1 D. & C. 77. The Court will direct a sale on the application of a mortgagee who is precluded from exercising his power of sale by special provisions in the mortgage, *e.g.*, that the money shall not be called in for a certain time: *Ex parte Bignold*, 3 Dea. 151.

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creditor, or the trustee on behalf of the estate, may bid or purchase (*z*).

(c.) Provided that the creditor may at any time, by notice in writing, require the trustee to elect whether he will or will not exercise his power of redeeming the security or requiring it to be realised, and if the trustee does not, within six months after receiving the notice, signify in writing to the creditor his election to exercise the power, he shall not be entitled to exercise it; and the equity of redemption, or any other interest in the property comprised in the security which is vested in the trustee, shall vest in the creditor, and the amount of his debt shall be reduced by the amount at which the security has been valued.

R. 13. Where a creditor has so valued his security, he may at any time amend the valuation and proof on showing to the satisfaction of the trustee, or the Court, that the valuation and proof were made *bonâ fide* on a mistaken estimate, or that the security has diminished or increased in value since its previous valuation; but every such amendment shall be made at the cost of the creditor, and upon such terms as the Court shall order, unless the trustee shall allow the amendment without application to the Court.

R. 14. Where a valuation has been amended in accordance with the foregoing rule, the creditor shall forthwith repay any surplus dividend which he may have received in excess of that to which he would have been entitled on the amended valuation, or as the case may be, shall be entitled to be paid out of any money for the time being available for dividend any dividend or share of dividend which he may have failed to receive by reason of the inaccuracy of the original valuation, before that money is made applicable to the payment of any future dividend, but he shall not be entitled to disturb the distribution of any dividend declared before the date of the amendment.

R. 15. If a creditor after having valued his security subsequently realises it, or if it is realised under the provisions of rule 12, the net amount realised shall be substituted for the amount of any valuation previously made by the creditor, and shall be treated in all respects as an amended valuation made by the creditor.

R. 16. If a secured creditor does not comply with the foregoing rules he shall be excluded from all share in any dividend (*a*).

Where the security is insufficient the conduct of the sale will generally be given to the mortgagee: *Re Jordan*, 13 Q. B. D. 228.

(*z*) Where a mortgagee bids he must pay a deposit and bear expenses of the sale like any other purchaser: *Ex parte Wilson*, Mont. & C. 110.

Proof by

(*a*) A secured creditor may, if he thinks fit, simply rest on his

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R. 17. Subject to the provisions of rule 12, a creditor shall in no case receive more than twenty shillings in the pound, and interest as provided by this Act.

R. 18. If a debtor was at the date of the receiving order liable in respect of distinct contracts as a member of two or more distinct firms, or as a sole contractor, and also as member of a firm, the circumstance that the firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of the contracts, against the properties respectively liable on the contracts.

Proof in respect of distinct contracts (*b*).

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security without proving: *White* v. *Simmons*, L. R., 6 Ch. A. 555; see *ante*, p. 402. When part of a mortgage debt is raised by sale of part of the property, and the remainder proves unsaleable, the mortgagee may retain the purchase-money received in discharge of his debt *pro tanto*, and prove for the balance: *Ex parte Greaves*, De G. 119. So a creditor with security may come in and prove if his security fails before the estate is distributed: *Ex parte Peake*, *Re Brodie*, L. R., 2 Ch. A. 453. And where there is a mortgage and a further charge secured upon the same and other property, the mortgagee may retain his mortgage for the original sum, and prove for the other moneys owing to him, giving up the further security: *Re Allison*, Fonbl. 26. So also, if a part of a secured claim is not provable in bankruptcy, the creditor may apply his security to payment of the part which is unprovable and prove for the balance: *Ex parte Hunter*, 6 Ves. 94; *Ex parte Johnson*, 3 De G., M. & G. 218. secured creditors.

(*b*) Rule 18 is identical with sect. 37 of the Act of 1869. It has been held that where a joint and several promissory note was signed by two members of a firm, and also by the firm which afterwards became bankrupt, the holder might prove against both the joint estate of the firm and the separate estates of the two signatories: *Ex parte Honey*, *Re Jeffrey*, L. R., 7 Ch. A. 178. It would appear that the term "firm" in this enactment applies to every case where there is a joint estate: per *Mellish*, L. J., *ibid.* at p. 179. See also *Ex parte Stone*, *Re Welsh*, L. R., 8 Ch. A. 914. Double proof.

Where a debtor carried on two businesses, one in England and the other in Brazil, under different firms, and proceedings were taken in each country for the administration of the assets respectively there situate, and the holders of certain bills of exchange drawn by the Brazilian and accepted by the English firm proved in Brazil and there received a dividend; it was held that there were not two estates being administered one in each country, but only one estate being administered partly in England and partly in Brazil, and that though the bill holders might be admitted to prove in England, they would receive no dividend until all the creditors had received a dividend at the rate of the Brazilian dividend: *Ex parte Wilson*, *Re Douglas*, L. R., 7 Ch. A. 490. See also *Banco de Portugal* v. *Waddell*, 5 App. Ca. 161. Estate administered in two countries.

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R. 19. When any rent or other payment falls due at stated periods, and the receiving order is made at any time other than one of those periods, the person entitled to the rent or payment may prove for a proportionate part thereof up to the date of the order as if the rent or payment grew due from day to day (*c*).

Periodical payments.

Interest.

R. 20. On any debt or sum certain, payable at a certain time or otherwise, whereon interest is not reserved or agreed for, and which is overdue at the date of the receiving order and provable in bankruptcy, the creditor may prove for interest at a rate not exceeding four per centum per annum to the date of the order from the time when the debt or sum was payable, if the debt or sum is payable by virtue of a written instrument at a certain time (*d*), and if payable otherwise, then from the time when a demand in writing has been made giving the debtor notice that interest will be claimed from the date of the demand until the time of payment.

Debt payable at a future time.

R. 21. A creditor may prove for a debt not payable when the debtor committed an act of bankruptcy as if it were payable presently, and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of five pounds per centum per annum computed from the declaration of a dividend to the time when the debt would have become payable, according to the terms on which it was contracted.

Admission or rejection of proofs.

R. 22. The trustee shall examine every proof and the grounds of the debt, and in writing admit or reject it, in whole or in part, or require further evidence in support of it (*e*). If he rejects a proof he shall state in writing to the creditor the grounds of the rejection.

R. 23. If the trustee thinks that a proof has been improperly admitted, the Court may, on the application of the trustee, after

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(*c*) This rule is identical with the enactment contained in sect. 35 of the Act of 1869. A landlord cannot distrain and prove for the same rent: *Ex parte Grove*, 1 Atk. 104. Payment of rent by a tenant, even after an act of bankruptcy, to a landlord who threatens to distrain cannot be impeached: *Moore* v. *Croome*, 1 Bing. 261; *Stephenson* v. *Wood*, 5 Esp. 200.

(*d*) The time for payment need not be expressly stated in the written instrument, if it appears by implication: *Duncombe* v. *Brighton Club*, L. R., 10 Q. B. 471.

Time to admit or reject proof.

(*e*) By rule 173, "Subject to the power of the Court to extend the time, the trustee, within fourteen days after receiving a proof, shall in writing either admit or reject it wholly or in part, or require further evidence in support of it."

notice to the creditor who made the proof, expunge the proof or reduce its amount.

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R. 24. If a creditor is dissatisfied with the decision of the trustee in respect of a proof, the Court may, on the application of the creditor, reverse or vary the decision (*f*).

R. 25. The Court may also expunge or reduce a proof upon the application of a creditor if the trustee declines to interfere in the matter, or in the case of a composition or scheme, upon the application of the debtor (*g*).

R. 26. For the purpose of any of his duties in relation to proofs, the trustee may administer oaths and take affidavits.

R. 27. The official receiver, before the appointment of a trustee, shall have all the powers of a trustee with respect to the examination, admission, and rejection of proofs, and any act or decision of his in relation thereto shall be subject to the like appeal (*h*).

Preferential debts.

Payment of Preferential Debts under a Composition or Scheme.]—No composition or scheme is to be approved by the Court which does not provide for the payment in priority to other debts of all debts directed to be so paid in the distribution of the property of a bankrupt (*i*): sect. 18, sub-sect. 14.

Appeal from rejection of proof.

(*f*) By rule 174, "Subject to the power of the Court to extend the time, no application to reverse or vary the decision of an official receiver or trustee in rejecting a proof shall be entertained after the expiration of twenty-one days from the date of the decision complained of."

(*g*) This expressly gives statutory confirmation to the decision in *Ex parte Merriman, Re Stenson*, 25 Ch. D. 144.

List of proofs, and proofs to be filed.

(*h*) Rule 171 provides that "The official receiver, or, as the case may be, the trustee in every bankruptcy proceeding shall on the first day of every month send to the registrar a certified list of all proofs, if any, tendered during the month next preceding, distinguishing in such list the proofs admitted, those rejected, and such as stand over for further consideration, and in the case of proofs admitted or rejected he shall transmit the proofs themselves for the purpose of being filed."

Transmission from official receiver to trustee.

By rule 172, "When a trustee is appointed, the proofs of debts that have been received by the official receiver, and which have not already been filed, shall be handed over to the trustee, but the official receiver shall first make a list of such proofs, which he shall give to the registrar to be filed with the proceedings."

As to the rights of creditors who have not proved their debts before declaration of a dividend, see sect. 61, *post*, p. 463.

(*i*) Preferential debts were not formerly entitled to priority of payment in the case of a composition: *Ex parte Walter, Re Heath*, L. R., 15 Eq. 412. See as to preferential debts, sect. 40, *post*, p. 442.

Rule 154 provides with regard to the costs of petition, &c.,

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With regard to preferential payments, it is enacted:

Priority of debts.

Sect. 40. "(1.) In the distribution of the property of a *compounding or arranging debtor* there shall be paid in priority to all other debts (*k*)—

"(a.) All parochial or other local rates due from the *compounding or arranging debtor* at the date of the receiving order, and having become due and payable within twelve months next before such time, and all assessed taxes, land tax, property or income tax, assessed on him up to the fifth day of April next before the date of the receiving order, and not exceeding in the whole one year's assessment;

"(b.) All wages or salary of any clerk (*l*) or servant (*m*) in

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that "All proceedings under the Act down to and including the making of a receiving order shall be at the cost of the party prosecuting the same, but when a receiving order is made, the Court may make an order for the payment of the costs of the petitioning creditor (including the costs of the bankruptcy notice (if any) sued out by him) out of the first net proceeds of the estate, and a composition or scheme which does not provide for the payment in full of any costs so awarded may be disallowed.

"When the proceeds of the estate are not sufficient for the payment of any costs necessarily incurred by the official receiver (in excess of the deposit) between the making of a receiving order and the conclusion of the first meeting of creditors, the Court may order such costs to be paid by the party prosecuting the proceedings."

(*k*) Similar enactments as to rates, taxes, salaries and wages, were contained in the Act of 1849, and decisions under that Act would consequently seem to be applicable to the present enactment. See as to preferential payments on the winding-up of a company, stat. 46 & 47 Vict. c. 28 (the Companies Act, 1883).

(*l*) See as to what persons will be entitled to priority of payment as "clerks," *Ex parte Gough*, 3 D. & C. 189; *Ex parte Hickin*, 3 De G. & Sm. 662; *Ex parte Harris*, De G. 165; *Ex parte Simmons*, 30 L. T. 311. As to whether the clerk must have been in the exclusive employment of the debtor, see *Ex parte Butler*, 28 L. T. 375; *Ex parte Harcourt*, 31 L. T. 188; *Ex parte Oldham*, 32 L. T. 181; *Ex parte Chipchase*, 7 L. T., N. S. 290.

(*m*) The term "servants" is not here confined to domestic servants: *Ex parte Crawfoot*, Mont. 270. There need not be a yearly hiring: *Ex parte Collier*, 4 D. & C. 520; the weekly payment of his wages will not deprive a "servant" of his right to priority: *Ex parte Humphreys*, 3 D. & C. 520. A commercial traveller is within the clause: *Ex parte Neal*, Mont. & M. 194; also the mate of a ship: *Ex parte Homborg*, 2 M., D. & De G. 642; but not a non-resident teacher at a school: *Ex parte Walter*, *Re Heath*, L. R., 15 Eq. 412.

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respect of services rendered to the *compounding or arranging debtor* during four months before the date of the receiving order (*n*), not exceeding fifty pounds; and

"(c.) All wages of any labourer or workman (*o*), not exceeding fifty pounds, whether payable for time or piece-work, in respect of services rendered to the *compounding or arranging debtor* during four months before the date of the receiving order.

"(2.) The foregoing debts shall rank equally between themselves, and shall be paid in full (*p*), unless the property of the *compounding or arranging debtor* is insufficient to meet them, in which case they shall abate in equal proportions between themselves.

"(3.) In the case of partners the joint estate shall be applicable in the first instance in payment of their joint debts, and the separate estate of each partner shall be applicable in the first instance in payment of his separate debts. If there is a surplus of the separate estates it shall be dealt with as part of the joint estate. If there is a surplus of the joint estate it shall be dealt with as part of the respective separate estates in proportion to the right and interest of each partner in the joint estate (*q*).

"(4.) Subject to the provisions of this Act all debts proved in the *composition or scheme of arrangement* shall be paid *pari passu* (*r*).

"(5.) If there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date of the receiving order at the rate of four pounds per centum per annum on all debts proved in the *composition or scheme of arrangement*.

(*n*) As to the effect of dismissal within this period, see *Ex parte Hampson, Re Burkhill*, 2 M., D. & De G. 462; as to absence with leave, see *Ex parte Gee*, 3 Dea. 563.

(*o*) It was held, that to entitle a workman or labourer to priority there must be a direct contract between him and his employer, such as could support an action for wages: *Ex parte Ball*, 3 De G., M. & G. 155.

(*p*) Preferential creditors will be entitled to immediate payment in full, notwithstanding that the funds in the hands of the trustee will be insufficient to meet future expenses: *Ex parte Powys, Re Bowen*, L. R., 17 Eq. 130; except, as it would seem, the costs of working the petition: see *Ex parte Hampson, Re Burkhill*, 2 M., D. & De G. 468.

(*q*) As to the keeping of distinct accounts where the same persons are members of different firms, see *Ex parte Marten*, 2 Bro. C. C. 15.

(*r*) The expression "all debts" includes voluntary debts: *Ex parte Pottinger, Re Stewart*, 8 Ch. D. 621.

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"(6.) Nothing in this section shall alter the effect of section five of the Act twenty-eight and twenty-nine Victoria, chapter eighty-six, 'to amend the Law of Partnership,' or shall prejudice the provisions of the Friendly Societies Act, 1875."

Preferential claim in case of apprenticeship (*t*).

Sect. 41. "(1.) Where at the time of the presentation of the bankruptcy petition any person is apprenticed or is an articled clerk to the *compounding or arranging debtor*, *the order approving the composition or scheme* shall, if either the *compounding or arranging debtor* or apprentice or clerk gives notice in writing to the trustee to that effect, be a complete discharge of the indenture of apprenticeship or articles of agreement; and if any money has been paid by or on behalf of the apprentice or clerk to the *compounding or arranging debtor* as a fee, the trustee may, on the application of the apprentice or clerk, or of some person on his behalf, pay such sum as the trustee, subject to an appeal to the Court, thinks reasonable, out of the *compounding or arranging debtor's* property, to or for the use of the apprentice or clerk, regard being had to the amount paid by him or on his behalf, and to the time during which he served with the *compounding or arranging debtor* under the indenture or articles before the commencement of the *composition or scheme of arrangement*, and to the other circumstances of the case.

"(2.) Where it appears expedient to a trustee, he may, on the application of any apprentice or articled clerk to the *compounding or arranging debtor*, or any person acting on behalf of such apprentice or articled clerk, instead of acting under the preceding provisions of this section, transfer the indenture of apprenticeship or articles of agreement to some other person."

Power to landlord to distrain for rent.

Sect. 42. "(1.) The landlord or other person to whom any rent is due from the *compounding or arranging debtor* may at any time, either before or after the commencement of the *composition or scheme of arrangement*, distrain upon the goods or effects of the *compounding or arranging debtor* for the rent due to him from the *compounding or arranging debtor*, with this limitation, that if such distress for rent be levied after the commencement of the *composition or scheme of arrangement* it shall be available only for one year's rent accrued due prior to the date of the order *approving the composition or scheme*, but the landlord or other person to whom the rent may be due from the *compounding or arranging debtor* may prove under the *composition or scheme of arrangement* for the surplus due for which the distress may not have been available (*u*).

(*t*) As to preferential claims in the case of apprenticeship, see *ante*, tit. APPRENTICESHIP.

Distress.

(*u*) A similar enactment was contained in the Act of 1869,

"(2.) For the purposes of this section the term "order *approving the composition or scheme*" shall be deemed to include an order for the administration of the estate of a debtor whose debts do not exceed fifty pounds, or of a deceased person who dies insolvent."

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Property available for Payment of Debts.]—Sect. 43 of the Act of 1883, defines the commencement of the bankruptcy or composition or scheme of arrangement, as the case may be. The section is as follows:—

"The *composition or scheme of arrangement* of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or, if the *compounding or arranging debtor* is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the *compounding or arranging debtor* within three months next preceding the date of the presentation of the bankruptcy petition (*x*); but no

Relation back of trustee's title.

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sect. 34. The landlord may distrain after the receiver has taken possession: *Ex parte Till, Re Mayhew*, L. R., 16 Eq. 97. There must be an actual distress to support the landlord's right against the trustee: *Gethin* v. *Wilkes*, 2 Dowl. 189; and the right may be forfeited by leaving the goods in the order and disposition of the debtor: *Ex parte Shuttleworth*, 1 D. & C. 224.

A landlord may distrain for rent payable in advance by custom or under an agreement: *Buckley* v. *Taylor*, 2 T. R. 600. A company, having statutory powers to recover money due to them by "the same means as a landlord may recover rent in arrear," are "landlords" within the meaning of this clause: *Ex parte Birmingham, &c. Gas Co., Re Fanshaw*, L. R., 11 Eq. 615. See also *Ex parte Hill, Re Roberts*, 6 Ch. D. 63; *Ex parte Harrison, Re Peake*, 13 Q. B. D. 753.

(*x*) By the Act of 1869, sect. 6, to support an adjudication, the act of bankruptcy must have occurred within *six* months before the presentation of the petition. The shortening of the period by the present Act greatly facilitates arrangements between debtors and their creditors outside proceedings in bankruptcy. After the expiration of three months without any bankruptcy petition having been presented a deed of composition, though containing a conveyance or assignment of the debtor's property for the benefit of his creditors (see sect. 4, sub-sect. 1 (a), *ante*, p. 383), will not be liable to be set aside, except on the ground of its being fraudulent within the stat. 13 Eliz. c. 5, or under

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bankruptcy petition, receiving order, or *order approving a composition or scheme* shall be rendered invalid by reason of any act of bankruptcy anterior to the debt of the petitioning creditor."

The effect of this enactment seems to be that where a composition or scheme of arrangement is accepted and a trustee is appointed the relation back of his title will prevent any creditor from taking a security after notice of the act of bankruptcy. Where, however, no trustee is appointed, but the debtor is allowed to retain possession of his property, the provisions of sect. 43 will not apply. In such cases no valid security can be effected after the making of the receiving order. See sect. 9 (1), *ante*, p. 395; but it does not appear clear that a creditor who has taken a security before the date of the receiving order will not be within sub-sect. (2) of that section, and retain his power of realising or otherwise dealing with his security, although the security may have been taken subsequently to the act of bankruptcy on which the receiving order is made.

The property of the debtor vesting in the trustee for the purpose of distribution among the creditors is thus described:—

Description of bankrupt's property divisible amongst creditors.

Sect. 44. "The property of the *compounding or arranging debtor* divisible amongst his creditors, and in this Act referred to as the property of the *compounding or arranging debtor*, shall not comprise the following particulars:—

"(1.) Property held by the *compounding or arranging debtor* on trust for any other person (*y*):

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the present Bankruptcy Act: see sects. 47 and 48, *post*, pp. 450, 451; and see *Allen* v. *Bonnett*, L. R., 5 Ch. A. 577.

Composition or scheme of arrangement by trustee. Application of Trustee Act to bankruptcy of trustee.

(*y*) By sect. 147, "Where a *compounding or arranging debtor* is a trustee within the Trustee Act, 1850, section thirty-two of that Act shall have effect so as to authorize the appointment of a new trustee in substitution for the *compounding or arranging debtor* (whether voluntarily resigning or not), if it appears expedient to do so, and all provisions of that Act, and of any other Act relative thereto, shall have effect accordingly." See as to removal of a bankrupt trustee, *ante*, tit. APPOINTMENT OF NEW TRUSTEES. It has never been held that the fact of a trustee having arranged with his creditors by a composition or liquidation is a sufficient ground for his removal.

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"(2.) The tools (if any) of his trade and the necessary wearing apparel and bedding of himself, his wife and children, to a value, inclusive of tools and apparel and bedding, not exceeding twenty pounds in the whole:

"But it shall comprise the following particulars:—

"(i.) All such property as may belong to or be vested in the *compounding or arranging debtor* at the commencement of the *composition or scheme of arrangement*, or may be acquired by or devolve on him before his discharge; and,

"(ii.) The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the *compounding or arranging debtor* for his own benefit at the commencement of his *composition or scheme of arrangement* or before his discharge, except the right of nomination to a vacant ecclesiastical benefice; and,

"(iii.) All goods being, at the commencement (*z*) of the *composition or scheme of arrangement*, in the possession, order or disposition of the *compounding or arranging debtor*, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof (*a*); provided that things in action other than debts

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Commencement of the composition or scheme.

(*z*) A bankruptcy, under the Act of 1869, sect. 11, commenced at the time of the act of bankruptcy being *completed;* a bankruptcy or composition, or arrangement by means of a scheme, now commences at the time of the act being committed (sect. 43, *ante*, p. 445), which will prevent questions arising as to reputed ownership on the ground of the act of bankruptcy being merely inchoate and not completed.

Reputed ownership.

(*a*) As the main object of an arrangement by means of a composition or scheme is to effect an expeditious and amicable settlement of a debtor's affairs without raising questions of complication and difficulty, or having recourse to contentious proceedings, the question of reputed ownership is not likely to arise in these cases. This subject will therefore require here only brief notice. The doctrine of reputed ownership applies only to goods, not to chattels real: *Rex* v. *Galliers*, 2 T. R. 133; fixtures: *Horn* v. *Baker*, 9 East, 215 (and see notes to *S. C.* in 2 Sm. L. C., p. 214, 8th ed.); or heirlooms: *Shaftesbury* v. *Russell*, 1 B. & C. 666. With these exceptions it will generally include all the personal property of the debtor; "goods" include all chattels personal: sect. 168; also money: *Ex parte Sampson*, De G. 9. See further, Robson, Bankr. 533 *et seq.;* Williams, Bankr. Prac. 100 *et seq.;* Baldwin, Bankr. 158. To constitute reputed ownership three conditions are essential: (i.) possession, order or disposition; (ii.) reputation of ownership; (iii.) consent of the true owner. The possession may be constructive, *e. g.*, that of a servant: *Ex parte Bolland, Re Gallhouse*, 24 L. T., N. S. 335; of a carrier: *Harvey* v. *Liddiard*, 1 Stark. 123; or of a lessee: *Housby* v. *Miller*, 1 E. & E. 192. As to what amounts to reputa-

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due or growing due to the *compounding or arranging debtor* in the course of his trade or business, shall not be deemed goods within the meaning of this section."

Rights of execution creditor in case of composition or scheme.

It has already been observed that sect. 18, subsect. (13), renders the provisions of Part III. of the Act applicable only "so far as the nature of the case and the terms of the composition or scheme admit:" *ante*, p. 416. It would appear that the provisions contained in sects. 45 and 46 will have no application where a composition or scheme having been accepted no trustee is appointed: the restriction of the rights of the execution creditor is as "against the trustee," and if the restriction is, according to the general rule, to be strictly construed, the effect will be that where there is no trustee the execution creditor will have the full benefit of the proceeds of the sale after deducting expenses for or towards the satisfaction of his claim. But sect. 9 (*ante*, p. 395) would probably prevent any execution from being levied on the property of a compounding debtor after the making of the receiving order. Under sect. 126 of the Act of 1869 (see *ante*, p. 380), the property of the compounding debtor remained in him, and was not vested in a trustee; and accordingly, there being no relation back of title, a resolution for composition was held to have no retrospective effect so as to invalidate securities taken by a creditor subsequently to the filing of the petition, but before the first meeting of creditors: *Ex parte Jones, Re Jones*, L. R., 10 Ch. A. 663. Indeed, a creditor who signed judgment and levied execution

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tion of ownership, see the judgment of Lord *Selborne*, C., in *Ex parte Watkins, Re Causton*, L. R., 8 Ch. A. at p. 528. The question whether goods are in the debtor's possession with the consent of the true owner will depend on the custom of the trade or business, and other circumstances of the particular case, and consent need not be expressed, but may be implied by acquiescence: *Re Rawbone's Trusts*, 3 K. & J. 476; *Hamilton* v. *Bell*, 10 Ex. 545; *Ex parte Watkins, supra*. Both the possession and the reputed ownership must be sole: *Ex parte Dorman, Re Lake*, L. R., 8 Ch. A. 51. It is to be observed that the present enactment is not confined to traders, but extends to persons engaged in any business; it, however, applies only to such goods and debts as belong or are owing to the debtor in his trade or business. See as to the effect of the Bills of Sale Acts with respect to reputed ownership, *post*, tit. MORTGAGES.

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before the registration of a resolution accepting a composition was held to have acquired a valid security for his debt, there being no equity raisable against him: *Ex parte Maclaren, Re Maccolla*, 16 Ch. D. 534. But an execution creditor lost his security if, after delivery of the writ to the sheriff, he proved for the full amount of his debt, and voted for the composition: *Ex parte Balbirnie, Re Balbirnie*, 3 Ch. D. 488.

Effect of a Composition or Scheme of Arrangement on Antecedent Transactions.]—It was provided by the Bankruptcy Act, 1869, s. 87, that where the goods of a trader were taken in execution in respect of a judgment for a sum exceeding 50*l.*, and sold, the sheriff was to retain the proceeds of the sale for fourteen days, and upon notice being served upon him within that period of a bankruptcy petition having been presented against such trader he was to hold the proceeds, after deducting expenses, on trust to pay the same to the trustee; otherwise, or if such notice having been served, no adjudication took place on that petition or on any other petition of which the sheriff had notice, he might deal with the proceeds as if no such notice had been served on him, *i.e.*, he might pay the money over to the execution creditor: see *Ex parte Villars, Re Rogers*, L. R., 9 Ch. A. 432.

The Act of 1883 has introduced important changes in this respect. By sect. 45 of that Act it is enacted that—

Restriction of rights of creditor under execution or attachment.

"(1.) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee *under a composition or scheme of arrangement* of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy (*z*) by the debtor.

"(2.) For the purposes of this Act, an execution against goods

(*z*) For definition of available act of bankruptcy, see sect. 168, *ante*, p. 430, n. (*m*).

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is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or in the case of an equitable interest, by the appointment of a receiver" (*a*).

Duties of sheriff as to goods taken in execution.

Sect. 46. "(1.) Where the goods of a debtor are taken in execution, and before the sale thereof notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods to the official receiver or trustee under the order, but the costs of the execution shall be a charge on the goods so delivered, and the official receiver or trustee may sell the goods or an adequate part thereof for the purpose of satisfying the charge (*b*).

"(2.) Where the goods of a debtor are sold under an execution in respect of a judgment for a sum exceeding twenty pounds, the sheriff shall deduct the costs of the execution from the proceeds of sale, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and the debtor is adjudged bankrupt thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the trustee in the bankruptcy, who shall be entitled to retain the same as against the execution creditor, but otherwise he shall deal with it as if no notice of the presentation of a bankruptcy petition had been served on him.

"(3.) An execution levied by seizure and sale on the goods of a debtor is not invalid by reason only of its being an act of bankruptcy, and a person who purchases the goods in good faith under a sale by the sheriff shall in all cases acquire a good title to them against the trustee *under the composition or scheme of arrangement.*"

Equitable execution.

(*a*) See, as to execution in the case of equitable interests under the Act of 1869, *Hatton* v. *Haywood*, L. R., 9 Ch. A. 229; *Ex parte Evans, Re Watkins*, 13 Ch. D. 252; *Salt* v. *Cooper*, 16 Ch. D. 544. The provisions of this and the following section appear to be applicable to cases of composition and arrangement under a scheme where a trustee is appointed. But it appears to be very doubtful whether they apply to the case of a composition or scheme of arrangement where no trustee is appointed. Where the property is vested in a trustee, the title of the trustee relates back, so as to prevent any creditor from obtaining security after notice of an available act of bankruptcy, see sect. 43, *ante*, p. 445. But where no trustee is interposed it would seem that a creditor will be secured, if he obtains his security before the receiving order is made, except in the case of an execution creditor who has seized but not sold prior to notice of the receiving order, in which case sect. 46 (1) appears to place a limit on his rights.

(*b*) By rule 249 (1), "Where a composition or scheme is sanctioned by the Court, the official receiver shall account to the debtor, or, as the case may be, to the trustee under the composition or scheme."

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Sect. 47. "(1.) Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes *a compounding or arranging debtor* within two years after the date of the settlement, be void against the trustee *under the composition or scheme of arrangement*, and shall, if the settlor becomes *a compounding or arranging debtor* at any subsequent time within ten years after the date of the settlement, be void against the trustee *under the composition or scheme of arrangement*, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof.

Avoidance of voluntary settlements (*c*).

"(2.) Any covenant or contract made in consideration of marriage, for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming *a compounding or arranging debtor* before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee under the *composition or scheme of arrangement*.

"(3.) 'Settlement' shall for the purposes of this section include any conveyance or transfer of property."

Avoidance of preferences in certain cases (*d*).

Sect. 48. "(1.) Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by

(*c*) As to the avoidance of voluntary settlements by the bankruptcy or insolvency of the settlor, see *post*, tit. SETTLEMENTS.

Fraudulent preference.

(*d*) It has been seen (*ante*, sect. 4, sub-sect. 1, pp. 383, 384) that a debtor will commit an act of bankruptcy, (i) by an assignment of all his property for the general benefit of his creditors; (ii) by a similar assignment for the benefit of some of his creditors to the exclusion of others; and (iii) an assignment of part of his property if made in contemplation of bankruptcy and with the intent to defraud or delay some of his creditors. It is obvious that the two last-named classes of dispositions will generally be acts of fraudulent preference, but other dealings by a debtor with his property also come within the category of fraudulent preference and will constitute acts of bankruptcy.

The subject of fraudulent preference has little, if any, applica-

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any person unable to pay his debts as they become due from his own money in favour of any creditor, or any person in trust for

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tion to cases of arrangements by means of *statutory* compositions or schemes. Where the act of bankruptcy on which the petition is founded is an alleged attempt by the debtor unduly to favour some particular creditor at the expense of the others, it is not likely that a resolution will be passed entertaining a proposal for a composition or scheme, or that, if such a resolution were passed, it would receive the sanction of the Court. The most important question which arises under the above enactment with reference to compositions, is as to the validity or otherwise, as against the trustee *in bankruptcy*, of such arrangements entered into between a debtor and some of his creditors, independently of the bankruptcy law. This section has therefore been left as it is in the Act itself, without the insertion of any substituted terms (as to which, see *ante*, p. 429, n. (*k*)).

It was held under the old bankruptcy laws that to constitute a fraudulent preference it was necessary that the act must be voluntary and also in contemplation of bankruptcy. It would seem that the words "with a view to giving such creditor a preference over the other creditors," practically have the same meaning as "voluntarily," in the technical sense which it had under the old law. See *Ex parte Bolland, Re Cherry*, L. R., 7 Ch. A. at p. 27.

But the present enactment apparently does away with the necessity for considering whether or not a disposition was made "in contemplation of bankruptcy," by making void every disposition made with the view of preferring particular creditors by a person who is in point of fact unable to pay his debts, if such person is adjudged bankrupt on a petition presented within three months after the disposition. See *Ex parte Griffith, Re Wilcoxon*, 23 Ch. D. 69; see also Baldwin, Bankr. 58.

If, therefore, three months elapse after the execution by a debtor of an ordinary common law composition deed for the benefit of such of his creditors as he can induce to concur in such arrangement, without a bankruptcy petition having been presented in the meantime, the disposition will neither constitute an act of bankruptcy under sect. 4, sub-sect. 1, *ante*, p. 383, nor be void under sect. 48, in the event of the debtor afterwards being adjudicated bankrupt. A conveyance, therefore, by a debtor of part or even of the whole of his property for the benefit of creditors, will, on the expiration of the period of three months, be unimpeachable, except on the ground of actual fraud or as being a voluntary settlement (which term "settlement" includes any conveyance or transfer) within the meaning of sect. 47.

The desire or "view" to give preference to a particular creditor or creditors over the others must be shown to be voluntary under the present no less than under the old law: *Ex parte Tempest*, L. R., 6 Ch. A. 70; *Smith* v. *Pilgrim*, 2 Ch. D. 127. It is a recognized principle that an assignment or payment by a debtor to a particular creditor under actual *pressure* is not voluntary and therefore not a fraudulent preference: *Ex parte Tempest, supra; Ex parte Topham, Re Walker*, L. R., 8 Ch. A. 614. When, however, the transaction is fraudulent in its inception, pressure by the creditor will not support it: *Ex parte Reader, Re Wrigley*,

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any creditor, with a view of giving such creditor a preference over the other creditors shall, if the person making, taking, paying, or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy.

"(2.) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt" (*e*).

Protection of *bonâ fide* transactions without notice.

Sect. 49. "Subject to the foregoing provisions of this Act with respect to the effect of *a composition or scheme of arrangement* on an execution or attachment, and with respect to the avoidance of certain settlements and preferences (*f*), nothing in this Act shall invalidate, in the case of a *composition or scheme of arrangement*—

"(a.) Any payment by the *compounding or arranging debtor* to any of his creditors,

"(b.) Any payment or delivery to the *compounding or arranging debtor*,

"(c.) Any conveyance or assignment by the *compounding or arranging debtor* for valuable consideration,

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L. R., 20 Eq. 763. See also *Ex parte Arnold, Re Wright*, 3 Ch. D. 70; *Ex parte Saffery, Re Cooke*, 4 Ap. Ca. 213; *Ex parte Bolland, Re Gibson*, 8 Ch. D. 230. A disposition will not generally be held to have the spontaneity necessary to constitute fraudulent preference where it is made in pursuance of a previous contract: *Harman* v. *Fisher*, Cowp. 117; *Hunt* v. *Mortimer*, 10 B. & C. 44; *Ex parte Hodgkin, Re Softley*, 20 Eq. 746; or to avoid a distress: *Mavor* v. *Croome*, 1 Bing. 261; or under threat of legal proceedings to enforce payment: *Ex parte Scudamore*, 3 Ves. 85; *Dixon* v. *Baldwin*, 5 East, 175; *Pinkett* v. *Wright*, 12 Cl. & F. 704; but see *Ex parte Hall, Re Cooper*, 19 Ch. D. 580, where *Jessel*, M. R., held that threats of proceedings would not be regarded as pressure in the case of a man on the verge of bankruptcy. Payment on demand by a creditor has been held not to be an act of fraudulent preference: *Crosby* v. *Crouch*, 2 Cowp. 166; *Pennell* v. *Reynolds*, 11 C. B., N. S. 709; even before the debt is actually payable: *Hartshorn* v. *Stodden*, 2 B. & P. 582; but it may be doubted whether these decisions would now be followed.

The desire to prefer a creditor need not be the sole view; if it is the dominant motive, the assignment or payment will be void as a fraudulent preference: *Ex parte Hill, Re Bird*, 23 Ch. D. 695.

(*e*) The words in the Act of 1869, sect. 92, were "any purchaser, payee or incumbrancer in good faith," &c.; the present enactment protects persons claiming through or under creditors, but not creditors themselves; and thereby negatives the doctrine laid down in *Butcher* v. *Stead*, L. R., 7 H. L. 839, that a voluntary payment by an insolvent debtor to a creditor who has no notice of the insolvency was not a fraudulent preference.

(*f*) As to executions and attachments, see sect. 46, *ante*, p. 450; as to avoidance of settlements, see sect. 47, *ante*, p. 450; and as to preferences, see sect. 48, *ante*, p. 451.

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"(d.) Any contract, dealing, or transaction by or with the *compounding or arranging debtor* for valuable consideration,

"Provided that both the following conditions are complied with, namely—

"(1.) The payment, delivery, conveyance, assignment, contract, dealing, or transaction, as the case may be, takes place before the date of the receiving order; and

"(2.) The person (other than the debtor) to, by, or with whom the payment, delivery, conveyance, assignment, contract, dealing, or transaction was made, executed, or entered into, has not at the time of the payment, delivery, conveyance, assignment, contract, dealing, or transaction, notice of any available act of bankruptcy committed by the *compounding or arranging debtor* before that time."

Realization of Property.]—It has already been seen (*ante*, p. 428) that it is the duty of the trustee in the administration and management of the debtor's property to have regard to the directions of the committee of inspection and of the creditors; and that, subject to the provisions of the Act in this and other respects, he is to act on his own discretion. In order to enable the trustee to realize the property of the debtor, the Act arms him with extensive powers and facilities for himself acquiring or transferring to others the possession thereof according to its nature or tenure. Sect. 50 provides that,—

Possession of property by trustee.

"(1.) The trustee shall, as soon as may be, take possession of the deeds, books, and documents of the *compounding or arranging debtor*, and all other parts of his property capable of manual delivery (*g*).

"(2.) The trustee shall, in relation to and for the purpose of acquiring or retaining possession of the property of the *compounding or arranging debtor*, be in the same position as if he were a receiver of the property appointed by the High Court, and the Court may on his application, enforce such acquisition or retention accordingly (*h*).

"(3.) Where any part of the property of the *compounding or arranging debtor* consists of stock, shares in ships, shares, or any

(*g*) As to withholding possession of documents from the trustee, see rule 259, *ante*, p. 418. A *bonâ fide* purchaser for value of book-debts, books, &c., will not be compelled to hand over the books of account to the trustee upon the subsequent bankruptcy of the vendor: *Ex parte Good, Re West*, 21 Ch. D. 868.

(*h*) As to the duties, rights and powers of receivers appointed by the High Court, see Seton on Decrees, 4th ed., p. 410.

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other property transferable in the books of any company, office, or person, the trustee may exercise the right to transfer the property to the same extent as the *compounding or arranging debtor* might have exercised it if he had not become *a compounding or arranging debtor* (*i*).

"(4.) Where any part of the property of the *compounding or arranging debtor* is of copyhold or customary tenure, or is any like property passing by surrender and admittance or in any similar manner, the trustee shall not be compellable to be admitted to the property, but may deal with it in the same manner as if it had been capable of being and had been duly surrendered or otherwise conveyed to such uses as the trustee may appoint; and any appointee of the trustee shall be admitted to or otherwise invested with the property accordingly.

"(5.) Where any part of the property of the *compounding or arranging debtor* consists of things in action, such things shall be deemed to have been duly assigned to the trustee.

"(6.) Any treasurer or other officer, or any banker, attorney, or agent of a *compounding or arranging debtor*, shall pay and deliver to the trustee all money and securities in his possession or power, as such officer, banker, attorney, or agent, which he is not by law entitled to retain as against the *compounding or arranging debtor* or the trustee. If he does not he shall be guilty of a contempt of Court, and may be punished accordingly on the application of the trustee."

Appointment of trustee.

Appointment of Trustee and vesting, &c. of Debtor's Property.]—The 54th section (*k*) of the Act of 1883, deals with the mode in which the property of a debtor will vest in a trustee on his appointment. The Act does not contain any express enactment providing for the appointment of a trustee in the case of a composition or scheme of arrangement; but it is to be presumed that the mode of appointment in such cases will be by an ordinary resolu-

(*i*) The trustee may, instead of transferring the shares, have himself registered as a shareholder: *Re Bentham Mills Co.*, 11 Ch. D. 900; *Ex parte Harrison, Re Cannock Colliery*, 26 Ch. D. 522.

As to disclaimer of shares by trustee, see sect. 55, sub-sect. 1, stated *post*, tit. DISCLAIMER.

(*k*) Sects. 51, 52, and 53, treat respectively of seizure by the trustee of the debtor's property, of sequestration of benefices, and of appropriation of the pensions of officers and other persons in the employment of the Crown, matters which do not seem to have any application to compositions or schemes of arrangement.

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tion of the creditors, or if the creditors so think proper, by the committee of inspection, as is essential in the case of the appointment of a trustee in bankruptcy (*l*). By sect. 54, it is enacted that—

Vesting and transfer of property.

"(1.) Until a trusteee is appointed the official receiver shall be the trustee for the purposes of this Act, and immediately on *the making of an order approving the composition or scheme* the property of the *compounding or arranging debtor* shall vest in the trustee (*m*).

"(2.) On the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed (*m*).

"(3.) The property of the *compounding or arranging debtor* shall pass from trustee to trustee, including under that term the official receiver when he fills the office of trustee, and shall vest in the trustee for the time being during his continuance in office, without any conveyance, assignment, or transfer whatever.

"(4.) The certificate of appointment of a trustee shall, for all purposes of any law in force in any part of the British dominions requiring registration, enrolment, or recording of conveyances or assignments of property, be deemed to be a conveyance or assignment of property, and may be registered, enrolled, and recorded accordingly."

Disclaimer.

Sect. 55 empowers the trustee to disclaim onerous property, and provides that any person injured by the operation of the disclaimer is to be deemed a creditor to the extent of the injury, and may prove accordingly. This section will be stated and considered, *post*, tit. DISCLAIMER (*n*).

Appointment of trustee in a bankruptcy.

(*l*) By sect. 21, sub-sect. 1, it is enacted that, "Where a debtor is adjudged bankrupt, or the creditors have resolved that he be adjudged bankrupt, the creditors may, by ordinary resolution, appoint some fit person, whether a creditor or not, to fill the office of trustee of the property of the bankrupt; or they may resolve to leave his appointment to the committee of inspection hereinafter mentioned." See further as to the appointment of joint or successive trustees, sect. 84, *ante*, p. 425. The words in this section are, "immediately on a debtor being adjudged bankrupt, the property of the bankrupt shall vest in the trustee": but it is conceived that this provision applies not only to an adjudication of bankruptcy, but also to a composition, where a trustee is appointed.

(*m*) Where a composition or scheme of arrangement is sanctioned by the Court, the official receiver is to account to the debtor, or, as the case may be, to the trustee under the composition or scheme. See rule 249 (1).

(*n*) For form of notice of intention to disclaim lease, see Appendix, Form 76.

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Sect. 56 gives to trustees wide powers for the purpose of disposing of and dealing with the property of the debtor. These powers will, in the case of a composition or scheme of arrangement, be subject to modification according to the terms of the particular arrangement: *ante*, p. 416. Sect. 56 provides as follows:—

Powers of trustee to deal with property.

"Subject to the provisions of this Act, the trustee may do all or any of the following things:

"(1.) Sell all or any part of the property of the *compounding or arranging debtor* (including the goodwill of the business if any, and the book debts due or growing due to the *compounding or arranging debtor*), by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels (*o*):

"(2.) Give receipts for any money received by him, which receipts shall effectually discharge the person paying the money from all responsibility in respect of the application thereof (*p*):

"(3.) Prove, rank, claim, and draw a dividend in respect of any debt due to the *compounding or arranging debtor* (*q*):

"(4.) Exercise any powers the capacity to exercise which is vested in the trustee under this Act, and execute any powers of attorney, deeds, and other instruments for the purpose of carrying into effect the provisions of this Act:

(*o*) By the Judicature Act, 1873 (36 & 37 Vict. c. 66), sect. 25, sub-sect. 6, the transfer of a debt will pass the right to all legal and other remedies, and the power to give a good discharge for the same without the concurrence of the assignor.

The sale and transfer may be to the debtor himself, who will then be entitled to sue in his own name: *Ex parte Tinker, Re France*, L. R., 9 Ch. A. 716; *Ex parte Caughey, Re Caughey*, 4 Ch. D. 533.

A sale may be made to the debtor's co-partners; but of course in all cases of sale by private contract care must be taken to have the property properly valued: *Re Motion*, L. R., 9 Ch. A. 192. See further as to sales by trustees, *post*, tit. Conditions of Sale.

(*p*) If it is intended that where several trustees have been appointed, the receipt of one shall be a good discharge, a special declaration to that effect must be inserted in the instrument embodying the terms of the composition or scheme. See sect. 84, *ante*, p. 425.

(*q*) When a trustee proves in another bankruptcy, it would seem that the debtor should join in the necessary affidavit of debt: *Ex parte Robson*, 2 M., D. & De G. 65.

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"(5.) Deal with any property to which the *compounding or arranging debtor* is beneficially entitled as tenant in tail in the same manner as the *compounding or arranging debtor* might have dealt with it; and sections fifty-six to seventy-three (both inclusive) of the Act of the session of the third and fourth years of the reign of King William the Fourth (chapter seventy-four), 'for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance,' shall extend and apply to proceedings under this Act, as if those sections were here re-enacted and made applicable in terms to those proceedings" (*r*).

Powers exercisable by trustee with permission of committee of inspection.

Sect. 57. "The trustee may, with the permission of the committee of inspection, do all or any of the following things (*s*):

"(1.) Carry on the business of the *compounding or arranging*

(*r*) As to disentailing assurances, see *post*, tit. SETTLEMENT. See also the judgment of *Turner*, L. J., in *Sturgis* v. *Morse*, 29 L. J., Ch. at p. 774.

(*s*) Where the debtor's estate cannot be immediately realised, and particularly where the debtor is engaged in trade or business, it will often be thought advisable to appoint a committee of the creditors to supervise and control the conduct of his affairs. The recent Act contains the following provisions with regard to committees of inspection:—

Sect. 22. "(1.) The creditors, qualified to vote, may at their first or any subsequent meeting, by resolution, appoint from among the creditors qualified to vote, or the holders of general proxies or general powers of attorney from such creditors, a committee of inspection for the purpose of superintending the administration of the bankrupt's property by the trustee. The committee of inspection shall consist of not more than five nor less than three persons.

"(2.) The committee of inspection shall meet at such times as they shall from time to time appoint, and failing such appointment, at least once a month; and the trustee or any member of the committee may also call a meeting of the committee as and when he thinks necessary.

"(3.) The committee may act by a majority of their members present at a meeting, but shall not act unless a majority of the committee are present at the meeting.

"(4.) Any member of the committee may resign his office by notice in writing signed by him, and delivered to the trustee.

"(5.) If a member of the committee becomes bankrupt, or compounds or arranges with his creditors, or is absent from five consecutive meetings of the committee, his office shall thereupon become vacant.

"(6.) Any member of the committee may be removed by an ordinary resolution at any meeting of creditors of which seven days' notice has been given, stating the object of the meeting.

"(7.) On a vacancy occurring in the office of a member of the committee, the trustee shall forthwith summon a meeting of

debtor, so far as may be necessary for the beneficial winding up of the same (*t*): Winding-up Estate under Statutory Compositions, &c.

"(2.) Bring, institute, or defend any action or other legal proceeding relating to the property of the *compounding or arranging debtor* (*u*):

"(3.) Employ a solicitor or other agent to take any proceedings or do any business which may be sanctioned by the committee of inspection (*x*):

"(4.) Accept as the consideration for the sale of any property

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creditors for the purpose of filling the vacancy, and the meeting may, by resolution, appoint another creditor or other person eligible as above to fill the vacancy.

"(8.) The continuing members of the committee, provided there be not less than two such continuing members, may act notwithstanding any vacancy in their body; and where the number of members of the committee of inspection is for the time being less than five, the creditors may increase that number so that it do not exceed five.

"(9.) If there be no committee of inspection, any act or thing or any direction or permission by this Act authorized or required to be done or given by the committee may be done or given by the Board of Trade on the application of the trustee."

By sect. 143, sub-sect. 2: "No defect or irregularity in the election of a member of a committee of inspection will vitiate any act done *bonâ fide* by him."

By sect. 21, the creditors may, if they think fit, entrust the appointment of the trustee to the committee of inspection. It must be borne in mind that the permission of the committee of inspection authorizing the trustee to exercise the powers of this section is liable to be over-ridden by directions to the contrary given by a resolution passed at a general meeting of the creditors. See sect. 89, *ante*, p. 428.

(*t*) By sect. 25 of the Act of 1869, the trustee was empowered in his own discretion to carry on the debtor's business, or bring actions, &c. In the case of an adjudication in bankruptcy, the creditors have no power to authorize the trustee to carry on the business for any other purpose than the beneficial winding up of the same: *Ex parte Emmanuel, Re Batey*, 17 Ch. D. 35. But of course this would not apply to the case of a composition or scheme, which is frequently entered into by the debtor and by others on his behalf, for the main purpose of preserving the business. As to keeping distinct the accounts of the business, see rule 225, *ante*, p. 423. Debtor's business.

(*u*) As to the title under which a trustee is to sue and be sued, see sect. 83, *ante*, p. 423. Action by trustee.

A trustee will generally be allowed his costs as between solicitor and client out of the estate of the debtor, but if that is likely to be insufficient to meet such costs, he should obtain an indemnity from the creditors. Costs.

(*x*) As to the case of a trustee being a solicitor, see sect. 73, sub-sect. 2, *ante*, p. 418. As to costs, see *ibid.* sub-sect. 3. Trustee solicitor.

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of the *compounding or arranging debtor* a sum of money payable at a future time subject to such stipulations as to security and otherwise as the committee think fit:

"(5.) Mortgage or pledge any part of the property of the *compounding or arranging debtor* for the purpose of raising money for the payment of his debts:

"(6.) Refer any dispute to arbitration, compromise all debts, claims, and liabilities, whether present or future, certain or contingent, liquidated or unliquidated, subsisting or supposed to subsist between the *compounding or arranging debtor* and any person who may have incurred any liability to the *compounding or arranging debtor*, on the receipt of such sums, payable at such times, and generally on such terms as may be agreed on:

"(7.) Make such compromise or other arrangement as may be thought expedient with creditors, or persons claiming to be creditors, in respect of any debts provable under the *composition or scheme of arrangement:*

"(8.) Make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the *compounding or arranging debtor*, made or capable of being made on the trustee by any person or by the trustee on any person (*y*):

"(9.) Divide in its existing form amongst the creditors, according to its estimated value, any property which from its peculiar nature or other special circumstances cannot be readily or advantageously sold.

"The permission given for the purposes of this section shall not be a general permission to do all or any of the above-mentioned things, but shall only be a permission to do the particular thing or things for which permission is sought in the specified case or cases" (*z*).

Distribution of Property.]—The Act gives to the

(*y*) It was held that under sect. 27 of the Act of 1869 the trustee might compromise any action which he had power to bring: *Leaming* v. *Lady Murray*, 13 Ch. D. 123. But now the sanction of the committee of inspection will be necessary, subject to any provision to the contrary in the composition deed or scheme of arrangement. As to the right of a debtor to object to a compromise by the trustee, see *Ex parte Austin*, *Re Austin*, 4 Ch. D. 13.

(*z*) This limitation is important; under the Act of 1869, s. 27 *ad fin.*, the sanction given for the purposes of the exercise of the powers therein given might have been a general or a specific permission.

trustee in the distribution of the property a discretion, subject to the control of the committee of inspection (if any) and of the creditors, and also subject to the provisions of the Act, which are set forth in the following sections:—

Declaration and distribution of dividends.

Sect. 58. "(1.) Subject to the retention of such sums as may be necessary for the costs of administration, or otherwise, the trustee shall, with all convenient speed, declare and distribute dividends amongst the creditors who have proved their debts (*a*).

"(2.) The first dividend (if any) shall be declared and distributed within four months after the conclusion of the first meeting of creditors, unless the trustee satisfies the committee of inspection that there is sufficient reason for postponing the declaration to a later date.

"(3.) Subsequent dividends shall, in the absence of sufficient reason to the contrary, be declared and distributed at intervals of not more than six months.

"(4.) Before declaring a dividend the trustee shall cause notice of his intention to do so to be gazetted in the prescribed manner, and shall also send reasonable notice thereof to each creditor mentioned in the *compounding or arranging debtor's* statement who has not proved his debt (*b*).

(*a*) For provisions with regard to ascertaining the amount available for dividend, see sect. 73, sub-sect. 4, *ante*, p. 418.

(*b*) The following are the rules relating to declaration and distribution of dividends:—

Notice of intended dividend.

Rule 175. "(1.) Not more than two months and not less than twenty-one days before declaring a dividend, the trustee shall give notice of his intention to do so to the Board of Trade (in order that the same may forthwith be gazetted), and to such of the creditors mentioned in the bankrupt's statement of affairs as have not proved their debts. Such notice shall specify the latest date within which proofs must be lodged, which shall not be less than seven days from the date of such notice.

"(2.) Immediately after the date mentioned as that within which proofs must be lodged, the trustee shall examine and in writing admit or reject any proof which has not been previously admitted or rejected, and give notice to the creditor of his decision.

"(3.) Where any creditor appeals against the decision of the trustee rejecting a proof under this rule, such appeal shall, subject to the power of the Court to extend the time in special cases, be commenced, and notice thereof given to the trustee within seven days from the date of the notice of the trustee's decision against which the appeal is made, and the trustee shall in such case make provision for the dividend upon such proof, and the probable costs of such appeal in the event of the proof being admitted. Where no appeal has been commenced within the

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"(5.) When the trustee has declared a dividend he shall send to each creditor who has proved a notice showing the amount of the dividend and when and how it is payable, and a statement in the prescribed form as to the particulars of the estate."

Joint and separate dividends.

Sect. 59. "(1.) Where one partner of a firm is *a compounding or arranging debtor*, a creditor to whom the *compounding or arranging debtor* is indebted jointly with the other partners of the firm or any of them, shall not receive any dividend out of the separate property of the *compounding or arranging debtor* until all the separate creditors have received the full amount of their respective debts.

"(2.) Where joint and separate properties are being administered, dividends of the joint and separate properties shall, subject to any order to the contrary that may be made by the Court on the application of any person interested, be declared together; and the expenses of and incident to such dividends shall be fairly apportioned by the trustee between the joint and separate properties, regard being had to the work done for and the benefit received by each property."

Provision for creditors residing at a distance, &c.

Sect. 60. "In the calculation and distribution of a dividend the trustee shall make provision for debts provable in bankruptcy appearing from the *compounding or arranging debtor's* statements, or otherwise, to be due to persons resident in places so distant from the place where the trustee is acting that in the ordinary

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time specified in this rule, the trustee shall exclude all proofs which have been rejected from participation in the dividend.

Declaration of dividend.

"(4.) Immediately after the expiration of the time fixed by this rule for appealing against the decision of the trustee, he shall proceed to declare a dividend, and shall give notice to the Board of Trade (in order that the same may be gazetted), and shall also send a notice of dividend to each creditor whose proof has been admitted, accompanied by a statement showing the position of the estate.

"(5.) The notices shall be in the Forms Nos. 77, 78, 79, and 80 in the Appendix, with such variations as circumstances may require; but the Board of Trade may from time to time alter such forms."

Production of notes, bills, &c.

Rule 176. "Subject to the provisions of section 70 of the Bills of Exchange Act, 1882, and subject to the power of the Court in any other case on special grounds to order production to be dispensed with, every bill of exchange, promissory note, or other negotiable instrument or security, upon which proof has been made, shall be exhibited to the trustee before payment of dividend thereon, and the amount of dividend paid shall be indorsed on the instrument."

Dividend may be sent by post.

Rule 177. "The amount of the dividend may, at the request and risk of the creditor, be transmitted to him by post."

For forms of notices, &c., see APPENDIX, Forms 77—80, *post*, pp. 483, 484.

course of communication they have not had sufficient time to tender their proofs, or to establish them if disputed, and also for debts provable in bankruptcy, the subject of claims not yet determined. He shall also make provision for any disputed proofs or claims, and for the expenses necessary for the administration of the estate or otherwise, and, subject to the foregoing provisions, he shall distribute as dividend all money in hand" (*c*). **Winding-up Estate under Statutory Compositions, &c.**

Sect. 61. "Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled to be paid out of any money for the time being in the hands of the trustee any dividend or dividends he may have failed to receive before that money is applied to the payment of any future dividend or dividends, but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein" (*d*). Right of creditor who has not proved debt before declaration of a dividend.

Sect. 62. "When the trustee has realised all the property of the *compounding or arranging debtor*, or so much thereof as can, in the joint opinion of himself and of the committee of inspection, be realised without needlessly protracting the trusteeship, he shall declare a final dividend, but before so doing he shall give notice in manner prescribed to the persons whose claims to be creditors have been notified to him, but not established to his satisfaction, that if they do not establish their claims to the satisfaction of the Court within a time limited by the notice, he will proceed to make a final dividend, without regard to their claims. After the expiration of the time so limited, or, if the Court on application by any such claimant grant him further time for establishing his claim, then on the expiration of such further time, the property of the *compounding or arranging debtor* shall be divided among the creditors who have proved their debts, without regard to the claims of any other persons" (*e*). Final dividend.

(*c*) Until a secured creditor has either valued or realised his security he has no provable debt in respect of which a trustee is bound to make any provision: *Ex parte Good, Re Lee*, 14 Ch. D. 82. Secured creditor.

(*d*) A creditor is entitled to come in and prove so long as there are any undistributed assets: *Ex parte Boddam*, 2 De G., F. & G. at p. 631. Proof.

(*e*) With regard to unclaimed and undistributed dividends or funds under the recent and former Acts, it is enacted by sect. 162, sub-sect. 1, that "Where the trustee, under any bankruptcy, composition or scheme pursuant to this Act, shall have under his control any unclaimed dividend which has remained unclaimed for more than six months, or where, after making a final dividend, such trustee shall have in his hands or under his control any unclaimed or undistributed moneys arising from the property of the debtor, he shall forthwith pay the same to the Bankruptcy

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Sect. 63. "No action for a dividend shall lie against the trustee, but if the trustee refuses to pay any dividend the Court may, if it thinks fit, order him to pay it, and also to pay out of his own money interest thereon for the time that it is withheld, and the costs of the application."

No action for dividend.

Power to allow *compounding or arranging debtor* to manage property.

Sect. 64. "(1.) The trustee, with the permission of the committee of inspection, may appoint the *compounding or arranging debtor* himself to superintend the management of the property of the *compounding or arranging debtor* or of any part thereof, or to carry on the trade (if any) of the *compounding or arranging debtor* for the benefit of his creditors, and in any other respect to aid in administering the property in such manner and on such terms as the trustee may direct (*f*).

Allowance to *compounding or arranging debtor* for maintenance or service.

"(2.) The trustee may from time to time, with the permission of the committee of inspection (*g*), make such allowance as he may think just to the *compounding or arranging debtor* out of his property for the support of the *compounding or arranging debtor* and his family, or in consideration of his services if he is engaged in winding up his estate, but any such allowance may be reduced by the Court."

Right of *compounding or arranging debtor* to surplus.

Sect. 65. "The *compounding or arranging debtor* shall be entitled to any surplus remaining after payment in full (*h*) of his creditors,

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Estates Account at the Bank of England. The Board of Trade shall furnish him with a certificate of receipt of the money so paid, which shall be an effectual discharge to him in respect thereof." As to mode of payment into the bank, rule 255 provides that "Any person whose duty it is, pursuant to section 162 of the Act, to pay into the Bankruptcy Estates Account any unclaimed funds or dividends, shall first apply in such manner as the Board of Trade may direct to the Board of Trade for a paying-in order. The paying-in order shall be an authority to the Bank of England to receive the payment."

(*f*) The requirement of the consent of the committee of inspection to allow the debtor to manage the property, is new. See sect. 26 of the Bankruptcy Act, 1869.

As to the rights of subsequent creditors when the debtor is allowed to carry on his trade, see *Ex parte Robertson* v. *Magnus*, L. R., 10 Ch. A. 962; *Engleback* v. *Nixon*, L. R., 10 C. P. 645.

By sect. 31 of the present Act an undischarged bankrupt obtaining credit to the extent of 20*l.* is to be guilty of a misdemeanor.

(*g*) Formerly an allowance could not be made to the debtor except with the consent of the creditors testified by a resolution passed in general meeting. See sect. 38 of the Bankruptcy Act, 1869.

(*h*) Of course, in the case of a composition, the payment in full will be of the composition dividend agreed upon, and not of the original debt, and the question whether or not interest is to be paid to the creditors on the amount of their debts or of the com-

with interest, as by this Act provided, and of the costs, charges, and expenses of the proceedings under the bankruptcy petition."

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Effect of Acceptance of a Composition or Scheme as regards Third Parties.]—The acceptance by a creditor of a composition or scheme will not release any person who under the Act would not be released by an order of discharge if the debtor had been adjudged bankrupt: sect. 18, sub-sect. 15; that is to say, any person who at the date of the receiving order was a partner or co-trustee with the debtor, or was jointly bound or had made any joint contract with him, or any person who was surety or in the nature of a surety for him. See sect. 30, sub-sect. 4.

Effect of composition, &c. as regards third parties.

Under the Bankruptcy Act, 1869, an order of discharge in any proceeding by adjudication, liquidation by arrangement, or composition, released only the debtor in whose favour it was given, leaving the liability of his solvent co-debtor unaffected: *Megrath* v. *Gray*, L. R., 9 C. P. 216. So a surety remained liable, though the resolution reserved no rights against sureties: *Ellis* v. *Wilmot*, L. R., 10 Ex. 10.

IV. Compositions and Schemes of Arrangement after Adjudication.

By the 28th section of the Bankruptcy Act, 1869, the trustee in bankruptcy was empowered, with the sanction of a special resolution of the creditors, to accept a composition or general scheme of settlement after the debtor had been adjudicated bankrupt. After an adjudication the creditors had no power to pass resolutions for a composition under sect. 126 of that Act, *Ex parte Bennett, Re Ward*, 16 Ch. D. 541, unless the adjudication was made under rule 266 of the Bankruptcy Rules, 1870, and merely ancillary to proceedings with a view to a composition: *Ex parte Milward, Re Stanley*, 16 Ch. D. 256. The present Act maintains the distinction between compositions and schemes

Compositions, &c., under sect. 23.

position dividend thereon, will depend upon the terms of the arrangement.

Compositions, &c. after Adjudication.

of arrangement entered into without any adjudication of bankruptcy, and those entered into after such adjudication. Sect. 23 of the Act empowers the creditors to entertain proposals for a composition or scheme of arrangement of the bankrupt's affairs at any time after the adjudication, and the Court may, if it approves of such composition or scheme, annul the adjudication; but may restore it, if it should subsequently appear that the annulling order was improperly obtained, or that the composition or scheme cannot proceed satisfactorily.

Sect. 23 is as follows:—

Power to accept composition or scheme after bankruptcy adjudication.

"(1) Where a debtor is adjudged bankrupt the creditors may, if they think fit, at any time after the adjudication, by special resolution, resolve to entertain a proposal for a composition in satisfaction of the debts due to them under the bankruptcy, or for a scheme of arrangement of the bankrupt's affairs; and thereupon the same proceedings shall be taken and the same consequences shall ensue, as in the case of a composition or scheme accepted before adjudication (*i*).

"(2) If the Court approves the composition or scheme, it may make an order annulling the bankruptcy (*k*), and vesting the property of the bankrupt in him or in such other person as the Court may appoint (*l*), on such terms and subject to such conditions, if any, as the Court may declare.

(*i*) As to the proceedings in the case of a composition or scheme before adjudication, see the provisions of sect. 18, considered in the preceding part of this Dissertation.

(*k*) A provision in a scheme of arrangement that the debtor's discharge shall depend on a resolution of the committee of inspection is *ultra vires*, and a scheme containing such a provision will not be approved by the Court: *Re Clark*, 13 Q. B. D. 426. Under sect. 28 of the Act of 1869, a scheme for settlement of the debtor's affairs, duly entertained and approved, was equivalent to a discharge in bankruptcy, and might be pleaded in bar of an action in respect of any debt provable in bankruptcy: *Gilbey* v. *Jeffries*, 11 Q. B. D. 559.

(*l*) Under the Act of 1861 the annulment of the bankruptcy did not revest the property in the debtor, unless the order so expressly provided: see *McDonald* v. *Thompson*, L. R., 4 C. P. 747. Probably the effect of an order simply annulling the bankruptcy would be to restore the debtor to his original position: see Baldwin, Bankr. 314, 315. As to the rights of an execution creditor after the approval of a composition, *Ex parte Lennard*, *Re Chidley*, 1 Ch. D. 177.

"(3) If default is made in payment of any instalment due in pursuance of the composition or scheme, or if it appears to the Court that the composition or scheme cannot proceed without injustice or undue delay, or that the approval of the Court was obtained by fraud, the Court may, if it thinks fit, on application by any person interested, adjudge the debtor bankrupt, and annul the composition or scheme, but without prejudice to the validity of any sale, disposition, or payment duly made, or thing duly done, under or in pursuance of the composition or scheme. Where a debtor is adjudged bankrupt under this sub-section, all debts, provable in other respects, which have been contracted before the date of such adjudication shall be provable in the bankruptcy." **Compositions, &c. after Adjudication.**

V. Stamps on Composition Deeds, &c.

Every deed, conveyance, assignment, surrender, admission, or other assurance relating solely to freehold, leasehold, copyhold, or customary property, or to any mortgage, charge, or other incumbrance on, or any estate, right, or interest in any real or personal property which is part of the estate of any bankrupt, and which, after the execution of the deed, conveyance, assignment, surrender, admission, or other assurance, either at law or in equity, is or remains the estate of the bankrupt or of the trustee under the bankruptcy, and every power of attorney, proxy paper, writ, order, certificate, affidavit, bond, or other instrument or writing relating solely to the property of any bankrupt, or to any proceeding under any bankruptcy, is exempt from stamp duty, except in respect of fees under the Act: sect. 144. And for the purposes of this section "bankruptcy" includes any proceeding under the Act, whether before or after adjudication, and whether an adjudication is made or not, and "bankrupt" includes any debtor proceeded against under the Act. **Exemption of deeds, &c. from stamp duty.**

Composition deeds and deeds of arrangement, not falling within the above exemption, will require to be stamped as bonds or deeds of covenant for securing the payment of money, *i. e.*, with *ad valorem* duty on the amount of the composition secured at the rate of 2*s.* 6*d.* for every 100*l.* See tit. Bonds.

APPENDIX

TO THE FOREGOING DISSERTATION.

A selection of Forms appended to the Bankruptcy Rules, 1883, relating to proceedings with a view to an arrangement by means of a composition or scheme.

LIST OF SELECTED FORMS (*m*).

No.
1. General Title (High Court).
2. General Title (County Court).
3. Declaration of Inability to pay.
4. Debtor's Petition.
10. Creditor's Petition.
12. Affidavit of Truth of Statements in Petition.
13. Affidavit of Truth of Statements in Petition (General Deponents).
47. Order sanctioning Composition or Scheme.
48. Application to enforce Provision in Composition.
49. Affidavit in support in Application.
50. Order for Enforcement.
51. Certificate of Composition or Scheme.
52. Affidavit of Proof.
53. Affidavit of Proof by Agent of Company.
54. General Proxy.
55. Special Proxy.
56. Voting Letter under Sect. 18.
57. Notice to Creditors of First Meeting.
58. Notice to Debtor to attend First Meeting.
59. Minutes of Proceedings at First Meeting.
60. List of Creditors to be used at every Meeting.
61. Order of Court for Meeting.
62. Notice of Meeting (General Form).
63. Notice convening Second Meeting to confirm Composition or Scheme.
64. Resolution at Second Meeting.
65. Notice to Creditors of Application to Court to sanction Composition.
66. Notice to creditors of Meeting to name Trustee.

No.
67. Notice of Meeting to be held to appoint new Trustee.
68. Minutes of Meeting for receiving Trustee's Resignation.
69. Report of Appointment of Trustee.
70. Request by Creditor to Board to notify Objection to Trustee, High Court.
71. Certificate of Appointment of Trustee.
72. Bond of Trustee.
73. Report of Appointment of Trustee to fill Vacancy.
74. Application by Trustee to Court for Directions.
75. Order on Application for Directions.
77. Notice of Intention to declare Dividend.
78. Notice of Intention to declare Fund Dividend.
79. Statement to accompany Notice of Dividend.
80. Notice of Dividend.
82. Certificate by Committee of Inspection as to Audit of Trustee's Accounts.
83. Affidavit verifying Trustee's Account.
84. Annual Return by Trustee.
85. Trustee's Trading Account.
86. Profit and Loss Account.
87. Affidavit verifying Trading Account.
91. Application to Board for Account at Local Bank.
92. Order of Board for Local Account.
93. Notice to Creditors of Intention to apply for Release.
94. Application for Release to Board of Trade.

Use of forms in Appendix.

(*m*) Rule 4 provides that:—"(1.) The forms in the Appendix, where applicable, and where they are not applicable forms of the like character, with such variations as circumstances may require, shall be used. Where such forms are applicable any costs occasioned by the use of any other or more prolix forms shall be borne by or disallowed to the party using the same, unless the Court shall otherwise direct.

FORMS.

[NOTE.—*The Notes appended to these Forms are not part of the Forms themselves, but are for the guidance of parties using the Forms. In all Forms requiring verification, the deponent may, at his option, substitute a statutory declaration for an oath.*]

FORM No. 1.

General Title (*High Court*).

In the High Court of Justice.
In Bankruptcy. No. ——— of 188 .
Re [James Brown].
[Ex parte (*here insert* "the Debtor," *or* "J. S. a creditor," *or* "*the Official Receiver*," *or* "*the Trustee*").]

No. 2.

General Title (*County Court*).

In the County Court of ——— holden at ———.
In Bankruptcy. No. ——— of 188 .
Re ———.
[Ex parte ———].

No. 3.

Declaration of Inability to Pay.

(*Title.*)

I, A. B. [*name and description of debtor*], residing at [*and* carrying on business at] ———, hereby declare that I am unable to pay my debts.

(Signature)
Dated ——— 188 . A. B.
Signed by the debtor in my presence.
Signature of witness.
Address.
Description.
Filed the ——— day of ——— 188 .
NOTE.—Where the debtor resides at a place other than his place of business both addresses should be inserted.

"(2.) Provided that the Board of Trade may from time to time alter any forms which relate to matters of an administrative, and not of a judicial, character, or substitute new forms in lieu thereof.

"Where the Board of Trade alters any form or substitutes any new form in lieu of a form prescribed by these rules, such altered or substituted form shall be published in the 'London Gazette.'"

The forms given in this selection for the most part relate to documents intended to be issued by or on behalf of the debtor or the trustee, and which may on occasion require to be drafted for the execution of such persons.

In some of the forms the word "debtor" is used, in others the word "bankrupt;" but it is conceived that many of the forms in which the latter word is used may be adapted for use in the case of a composition or arrangement by means of a scheme, and some have been adapted accordingly, the words [*debtor*], &c., being enclosed in brackets.

No. 4.

Debtor's Petition.

(*Title.*)

I, [*name, address, and description of debtor*] having for the greater part of the past six months resided at [*or* carried on business at ———] within the district of the Court [*or, as the case may be, following the terms of sect.* 95] and being unable to pay my debts, hereby petition the Court that a receiving order be made in respect of my estate [and that I may be adjudged bankrupt].

Dated ——— 188 . (Signature.)

Signed by the debtor in my presence.

Signature of witness.

Address.

Description.

Filed the ——— day of ——— 188 .

NOTE.—Where the debtor resides at a place other than his place of business both addresses should be inserted.

No. 10.

Creditor's Petition.

(*Title.*)

I, C. D., of ——— [*or* we, C. D., of ———, and E. F., of ———], hereby petition the Court that a receiving order be made in respect of the estate of [*here insert name, address, and description of debtor*].

1. That the said A. B. has for the greater part of six months next preceding the presentation of this petition resided [*or* carried on business] at ——— within the district of this Court [*or, as the case may be, following the terms of sect.* 95].

2. That the said A. B. is justly and truly indebted to me [*or* us in the aggregate] in the sum of £ ——— [*set out amount of debt or debts, and the consideration*].

3. That I [*or we*] do not, nor does any person on [my] behalf hold any security on the said debtor's estate, or on any part thereof, for the payment of the said sum.

Or,

That I hold security for the payment of [*or* part of] the said sum, [but that I will give up such security for the benefit of the creditors of A. B. in the event of his being adjudged bankrupt] [*or* and I estimate the value of such security at the sum of £ ———].

Or,

That I, C. D., one of your petitioners, hold security for the payment of, *&c.*

That I, E. F., another of your petitioners, hold security for the payment of, *&c.*

4. That A. B., within three months before the date of the presentation of this petition has committed the following act [*or*

acts] of bankruptcy, namely [*here set out separately the acts of bankruptcy*].

(Signed) C. D.

[Signed by the petitioner in my presence.] E. F.
Signature of witness.
Address.
Description.

NOTE.—If there be more than one petitioner, and they do not sign together, the signature of each must be separately attested, *e. g.*, "Signed by the petitioner E. F. in my presence." If the petition be signed by a firm, the partner signing should add also his own signature, *e. g.*, "A. S. & Co. by J. S., a partner in the said firm." If the debtor resides at any place other than the place where he carries on business both addresses should be inserted.

Indorsement.

This petition having been presented to the Court on the ——— day of ———, 188—, it is ordered that this petition shall be heard at ——— on the ——— day of ——— 188—, at ——— ——— o'clock in the ——— noon.

And you, the said A. B., are to take notice that if you intend to dispute the truth of any of the statements contained in the petition you must file with the registrar of this Court a notice showing the grounds upon which you intend to dispute the same, and send by post a copy of the notice to the petitioner [three] days before the date fixed for the hearing.

No. 12.

Affidavit of Truth of Statements in Petition.

(*Title.*)

I, the petitioner named in the petition hereunto annexed, make oath [*if the petitioner declare or affirm, alter the form accordingly*] and say:—

1. That the several statements in the said petition are within my own knowledge true.

Sworn at, &c. C. D.

NOTE.—If the petitioner cannot depose that the truth of all the several statements in the petition is within his own knowledge he must set forth the statements the truth of which he can depose to, and file a further affidavit by some person or persons who can depose to the truth of the remaining statements.

No. 13.

Affidavit of Truth of Statements in Petition.

(*Title.*)

We C. D., E. F., G. H., &c., the petitioners named in the petition hereunto annexed, severally make oath and say:—

And first I, the said C. D., for myself say—

1. That A. B. is justly and truly indebted to me in the sum of ——— pounds as stated in the said before-mentioned petition.

2. That the said A. B. committed the act of bankruptcy stated to have been committed by him in the said before-mentioned petition.

And I, the said E. F., for myself say—

3. That A. B. is justly and truly indebted to me in the sum of ——— pounds, as stated in the said before-mentioned petition.

And I., the said G. H., for myself say—

4. That A. B., is, *&c.*

C. D.
E. F.
G. H.

Sworn by the deponents C. D., E. F., and G. H., &c.

See note to last Form.

No. 47.

Order sanctioning Composition or Scheme.

(*Title.*)

On the application of ———, and on reading ———, and hearing ——— and the Court being satisfied that the creditors in the above matter have duly accepted and approved a composition [*or* scheme] in the following terms, namely [*here insert terms if short; if not insert* "in the terms contained in exhibit A. annexed hereto"], the said composition [*or* scheme] is hereby sanctioned.

Dated ———.

By the Court,
Registrar.

N.B.—If the terms of the composition or scheme be contained in an exhibit annexed to the order, each page of the exhibit must be initialled by the Registrar.

No. 48.

Application for Enforcement of Provision in a Composition.

(*Title.*)

In the matter of a composition made by A. B., of ———.

I, F. M., of ———, do apply to this Court for an order for the enforcement of the provisions of the said composition against ———, on the grounds set forth in the annexed affidavit.

Dated ———.

F. M.

No. 49.

Affidavit in support of Application for Enforcement of Provisions of a Composition under Sect. 18 *or* 23.

(*Title.*)

In the matter of a composition made by A. B., of ———.

I, F. M., of ———, make oath and say:—

1. That I am interested in the said composition, having proved my debt as a creditor of the said A. B. [*or as the case may be*].

2. That [one of] the provisions of the said composition is [*or* are] that [*here set it or them out*].

3. That ——— has failed to comply with the said provisions [*or, as the case may be*].

Sworn at, &c.

F. M.

No. 50.

Order for Enforcement of Provisions in a Composition.

(*Title.*)

In the matter of a composition made by A. B., of ———.

Upon hearing the application of F. M., of ——— and reading [*here insert evidence*], the Court being of opinion that the provisions of the said composition mentioned in the said affidavit should be enforced, it is ordered that [*here insert order*].

Dated ———.

By the Court,

To ——— Registrar.

Take notice that unless you obey the directions contained in this order, you will be deemed to have committed a contempt of Court.

No. 51.

Certificate of Scheme or Composition.

(*Title.*)

I hereby certify that a composition [*or* scheme of arrangement] between A. B. of ———, the above-named debtor, and his creditors was duly sanctioned by the Court on the ——— day of ———.

Dated ———.

M. N., Official Receiver.

No. 52.

Affidavit for Proof of Debt with or without Security.

(*Title.*)

I ———, of ———, make oath and say:—

1. That the said A. B. was at the date of the receiving order and still is justly and truly indebted to [me] in the sum of ——— for [*state consideration and insert or annex a summary of account and describe generally any vouchers necessary to substantiate the debt*] for which said sum or any part thereof I say that [I] have not nor hath any person by my order or to my knowledge or belief or [my] use had or received any manner of satisfaction or security whatsoever, save and except the following:—

[*Here set out the particulars of all securities held, and where the securities are on the property of the debtor assess the value of the same, and if any bills or other negotiable securities be held specify them in the schedule.*]

Date.	Drawn.	Acceptor.	Amount.	Date when due.

Sworn, &c.

[*When affidavit is made by a clerk alter the form accordingly, and add the following.*] That I am in the employ of C. D., and that I am duly authorized by him to make this affidavit, and that it is within my own knowledge that the aforesaid debt was incurred, and for the consideration above stated, and that such debt, to the best of my knowledge and belief, still remains unpaid and unsatisfied.

No. 53.

Affidavit of Proof of Debt by Agent of a Company.

(*Title.*)

I ———, of ———, secretary [*or* manager or other officer] of [*here state name of corporation*] make oath and say, That I am duly authorized, under the seal of the [*here set out the name and style of the corporation*], to make the proof of debt on its behalf [*then follow last affidavit, altering form accordingly*].

NOTE.—This form may also be incorporated in the proof in the same manner as is provided in the case of a clerk proving for his employer.

No. 54.

General Proxy.

(*Title.*)

I, C. D., of ———, a creditor, hereby appoint the official receiver in the above matter [*or* Mr. A. B. of ———, a clerk in my

regular employ] to be my general proxy in the above matter [excepting as to the receipt of dividend].

(Signed) C. D.

Dated ———.

Signature of Witness.

Address.

NOTE.—When the creditor desires that his general proxy should receive dividends he should strike out the words "excepting as to the receipt of dividends," putting his initials thereto. The creditor must fill up blanks in his own handwriting.

The authorized agent of a corporation may fill up blanks, and sign for the corporation, *e.g.*, for the ——— company.

J. S. (duly authorized under the seal of the company).

No. 55.

Special Proxy.

(*Title.*)

I, C. D., of ———, a creditor, hereby appoint the official receiver in the above matter [*or* Mr. A. B. of ———] as my proxy at the meeting of creditors to be held on the —— day of ———, to vote for [*or* against] [*here specify the particular resolution or name of proposed trustee.*]

(Signed) C. D.

Dated ———.

Signature of Witness.

Address.

NOTE.—The creditor must fill up blanks in his own handwriting. The authorized agent of a corporation may fill up blanks and sign for the corporation, *e.g.*, for the ——— company.

J. S. (duly authorized under the seal of the company).

No. 56.

Voting Letter under Sect. 18 (2).

Re———.

Date ———.

Address ———.

SIR,

I REQUEST you to record my vote for [*or* against] the above proposed composition [*or* scheme of arrangement] in the said matter. (Signed) J. S.

Signature of Witness.

Address.

To the Official Receiver of the Estate of ———.

N.B.—This form of voting letter is to be attached to the notice of proposed composition or scheme to be circulated by the official receiver. The letter must be sent in so as to reach the official receiver not later than the day before the meeting.

No. 57.

Notice to Creditors of First Meeting.

(*Title.*)

Take notice that the first meeting of creditors in the above matter will be held on the ——— day of ——— at [*insert place*] at [*insert hour*].

To entitle you to vote thereat your proof must be lodged with me *one clear day at least* before the meeting.

Forms of proxies can be obtained from me on payment of ———.

The public examination of the debtor is fixed for ——— day of ——— at ———.

[*To* X. Y.] M. N., Official Receiver.

Indorsement.

At the first meeting the creditors may (amongst other things)—

1. By special resolution resolve to entertain a proposal for a composition or scheme under sect. 18 of the Act, either with or without the intervention of a trustee.

2. By ordinary resolution resolve that the debtor be adjudged bankrupt, and in that case they may also, by ordinary resolution, if the estate exceeds 300*l.*, appoint a trustee.

3. By ordinary resolution fix the remuneration of the trustee, or resolve that the same be left to the committee of inspection; but if one-fourth in number or value of creditors dissent from the resolution fixing the trustee's remuneration, the Board of Trade is to fix his remuneration.

4. By ordinary resolution to appoint a committee of inspection from among the creditors qualified to vote, or the holders of general proxies or general powers of attorney for such creditors.

5. By ordinary resolution determine the remuneration to be paid to the special manager, if one be appointed.

No. 58.

Notice to Debtor to attend first Meeting of Creditors.

(*Title.*)

Take notice that the first meeting of your creditors will be held on the ——— day of ——— 18— at ——— o'clock at [*here insert place where meeting will be held*], and that you are required to attend thereat and submit to such examination and give such information as the meeting may require. And further, take notice that if you fail to comply with the requirements of this notice, you will be guilty of a contempt of Court and may be punished accordingly.

Dated ———.

G. H., Official Receiver.

No. 59.

Minutes of Proceedings at First Meeting.

(*Title.*)

Minutes of resolutions come to and proceedings had at the first meeting of creditors held at ——— this ——— day of ——— 18 —, ——— Chairman, the official receiver [*or* the official receiver being absent, F. K., of ——— Chairman].

Resolved as follows:—

That A. B. shall be adjudged bankrupt, and that the official receiver do apply to the Court to make the adjudication.

That G. H., of [*residence and occupation*], shall be the trustee of the property of the bankrupt at [*here state remuneration*] [*or* That the appointment of a trustee in this bankruptcy be made by the committee of inspection].

That I. K., L. M., N. O., P. Q., and R. S., be appointed the committee of inspection in this bankruptcy, for the purpose of superintending the administration of the property of the bankrupt by the trustee.

Or,

That [the debtor's] proposal for a composition [*or* scheme] be entertained, and that this meeting be adjourned to the ——— day of ——— for the purpose of settling [*or* further considering] the terms thereof.

[*Here add any other resolutions that may be come to as to the manner of the administration of the property by the trustee, the transfer of the proceedings to another Court.*]

F. K., Chairman.

Number.	Assenting Creditors' Signatures.	Amount of Proof.	Number.	Dissenting Creditors' Signatures.	Amount of Proof.

NOTE.—When a resolution is carried unanimously the creditors need not sign, but when a division is taken all creditors and holders of proxies voting should sign. The signatures must be attached at the meeting. Resolutions should be put separately.

No. 60.

List of Creditors assembled to be used at every Meeting.

(*Title.*)

Meeting held at ——— this ——— day of ——— 18—.

Number.	Names of Creditors present or assembled.	Amount of Proof.		
1				
2				
3				
4				
5				
6				
7				
7	Total number of creditors present or assembled			

No. 61.

Order of Court for General Meeting of Creditors.

(*Title.*)

Upon the application of C. D., of ———, it is ordered that the trustee of the property of the [debtor] [*or* the official receiver of this Court] do summon a meeting of the creditors of the bankrupt to be held at ——— on the ——— day of ——— 18—, at ——— o'clock in the ——— noon [*here state the purpose for which meeting called.*]

Dated ———.

By the Court,
Registrar.

No. 62.

Notice of Meeting (*General Form*).

(*Title.*)

Take notice that a meeting of creditors in the above matter will be held on the ——— day of ——— at ———, at ——— o'clock.

Agenda.

[*Here insert purpose for which meeting was called.*]

Dated ———.

(Signed)
G. H., Trustee
[*or* Official Receiver].

N.B.—Forms of proxies can be obtained on application to the official receiver, on payment of ———.

No. 63.

Notice convening Second Meeting to confirm Composition or Scheme.

(*Title.*)

In the matter of a proposed composition.

A second general meeting of the creditors of the above-named person [*or* persons] is hereby summoned to be held at ——— on ———, the ——— day of ——— instant [*or* next], at ——— o'clock in the ——— noon precisely. A majority in number representing three-fourths in value of all the creditors who have proved, may confirm the resolution come to at the first general meeting, to accept the proposed composition, which is to the following effect [*state proposed terms*]. If the composition be rejected the meeting may proceed to elect a trustee.

Dated the ——— day of ——— 18—.

(Signed) M. N. (Official Receiver).

NOTE.—The report of the official receiver on the proposed composition should be annexed to this notice.

No. 64.

Resolution at Second General Meeting.

(*Title.*)

In the matter of a proposed composition.

We, the undersigned, being the statutory majority of creditors assembled at the second meeting in the above matter, duly held at ———, this ——— day of ——— 18—, in accordance with the provisions of the said Act, do hereby confirm the resolution passed by the statutory majority of the creditors of the said A. B. assembled at the first meeting.

[*Here follow signatures of creditors.*]

F. K., Chairman.

No. 65.

Notice to Creditors and Official Receiver of Application to Court to sanction Composition or Scheme.

(*Title.*)

Take notice that application will be made to the Court on the ——— day of ———, to sanction the composition [*or* scheme], approved on the ——— day of ——— by the statutory majority of creditors.

Dated ———. G. H.

No. 66.

Notice to Creditors of Meeting to remove Trustee and to Appoint a Person to fill the Vacancy.

(*Title.*)

At the request of one-fourth in value of the creditors of the [debtor] a general meeting of the creditors is hereby summoned to be held at ——— on the ——— day of ——— 18— at ——— o'clock in the ——— noon for the purpose of considering the propriety of removing G. H., the trustee of the property of the [debtor] from his office as such trustee, and in the event of his removal to appoint a person to fill the vacancy.

Dated ———. L. M.
A member of the Committee of Inspection
[*or* Official Receiver].

No. 67.

Notice of Meeting to be held to appoint New Trustee.

(*Title.*)

I, C. D., the official receiver in the above matter, hereby give you notice that a meeting of creditors will be held at ——— on the ——— day of ———, 18—, at ——— o'clock in the ——— noon, for the purpose of appointing a trustee in the place of the late trustee, who has resigned the office [*or* who has died, *or* has become bankrupt].

Dated ———. C. D.
To X. Y. Official Receiver.

No. 68.

Minutes of Meeting for receiving Resignation of Trustee, &c.

(*Title.*)

Minutes of proceedings had at a meeting of creditors of the said [debtor] held at ——— on the ——— day of ——— 18—.

Chairman of the meeting, E. F., of ———.

Resolved (*here should follow resolutions*).

E. F., chairman of this meeting.

No. 69.

Report of Appointment of Trustee.

(*Title.*)

It is reported to the Board of Trade as follows :—

1. That [the first] meeting of creditors in this [composition] was held at ——— on the ——— day of ——— at ——— o'clock in the ——— noon.

2. That by resolution at such meeting G. H. of ——— was appointed to fill the office of trustee of the property of the [debtor].

Dated ———. F. K.,
Chairman [Official Receiver.]

No. 70.

Request by Creditors to Board of Trade to notify Objection to Trustee to High Court.

(*Title.*)

We, the undersigned, being a majority in value of the creditors of the above-named A. B., do hereby request the Board of Trade to notify to the High Court their objection to the appointment of C. D., as trustee of the property of the [*debtor*].

Dated this ——— day of ——— 18—.

Signature of creditors, Amount of debt ———.

E. F.

G. H.

K. L., *&c.*

No. 71.

Certificate of Appointment of Trustee (*a*).

(*Title.*)

This is to certify that G. H., of ——— has been duly appointed and approved as trustee of the estate of ———, who was adjudged bankrupt on the ——— 18— (*a*).

By the Board of Trade,

(Signed) J. S.

No. 72.

Bond of Trustee (*a*).

(*Title.*)

Know all men by these presents, that we, G. H., of, &c., and C. D. of, &c., and E. F., of, &c., are jointly and severally held and firmly bound to ——— in £——— to be paid to the said ———, or his certain attorney, executors, administrators, or assigns. For which payment to be made we bind ourselves and each and every of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this ——— day of ———, one thousand eight hundred and ———.

Whereas on the ——— day of ——— 18—, A. B., of ———, was adjudged bankrupt; and whereas at [the first meeting] of creditors under the said bankruptcy the said G. H. was appointed trustee of the property of the bankrupt; and whereas the said trustee has been directed to give security by bond to [*here state to whom*] in the sum of ———, with two sufficient sureties thereto.

Now, therefore, the condition of this bond or obligation is such that if the said G. H. shall and do from time to time well and sufficiently perform and execute all and singular the duties required of him as trustee by the Bankruptcy Act, 1883, or any general rule made or hereafter to be made under such Act, this

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(*a*) No form of certificate or bond is expressly laid down for use in the case of a trustee appointed under a composition or scheme of arrangement.

obligation shall be void or otherwise shall remain in full force and virtue.

Signed, sealed and delivered by the above-bounden ——— in the presence of

G. H. (L.S.)
C. D. (L.S.)
E. F. (L.S.)

NOTE.—If a deposit of money be made, the memorandum thereof should follow the terms of the condition of the bond.

No. 73.

Report of Appointment of Trustee to fill a Vacancy caused by Resignation, &c.

(*Title.*)

It is reported to the Board of Trade as follows:—

1. That a meeting of creditors in this [*composition*] was held at ——— on the ——— day of ——— at ——— o'clock in the ——— noon, for the purpose of receiving of G. H. his resignation of the office of trustee and of appointing a person to fill such office [*or* for the purpose of appointing a trustee in the place of G. H., who is dead, *or* who has resigned, *or as the case may be.*]

2. That the said G. H. resigned the office of trustee, and by resolution at such meeting N. O. of ———, was appointed to fill the office of trustee of the property of the [*debtor*].

F. K., Chairman.

No. 74.

Application for Directions by Trustee.

(*Title.*)

I desire to make application to the Court for its directions [*here state the particular matter in relation to which they are sought.*]

Trustee.

Let this application be heard on the ——— day of ——— at ——— o'clock in the ——— noon, and let the trustee give notice to [*here insert the persons to whom it is to be given*].

Dated this ——— day of ——— 188—.

Registrar.

No. 75.

Order on Application of Trustee for Directions.

(*Title.*)

Whereas at a Court held this day the trustee of the property of the [*debtor*] applied to this Court for its directions [*here state the particular matter in relation to which they are sought*]. Now upon hearing of C. D., of ———, on the matter, it is ordered ——— [*here set out the order*], and that the trustee do pay out of his own moneys [*or* out of the property of the *debtor*] the sum of ——— the costs of this order, and the sum of ——— to C. D. for his costs [*or* that C. D. do pay the sum of ——— the costs of this order, and also the sum of ——— to C. D. for his costs].

Dated ———. By the Court,

Registrar.

No. 77.

Notice of Intention to declare Dividend.

(*Title.*)

A dividend is intended to be declared in the above matter. You are mentioned in the debtor's statement of affairs, but you have not yet proved your debt.

Creditors who have not proved their debts by the ——— day of ——— 188—, will be excluded from this dividend.

Dated ———.

G. H., Trustee,
[Address.]

To X. Y.

No. 78.

Notice of Intention to declare Final Dividend.

(*Title.*)

A final dividend is intended to be declared in the above matter.

If you do not establish your claim to the satisfaction of the Court on or before the ——— day of ——— 18—, or such later day as the Court may fix, you will be excluded from dividend.

Dated ———.

G. H., Trustee,
[Address.]

To X. Y.

No. 79.

Statement to accompany Notice of Dividend.

(*Title.*)

STATEMENT showing the position of the estate at date of declaring [1st] dividend.

Dr.					Cr.				
1884. 4 Jan. to 30 Apr.	To total receipts from [date of receiving order] [*or* declaration of first dividend] to date.				1884. 4 Jan. to 30 Apr.	By payments.			
						,, fees, costs, and charges under Rule 104.			
						,, preferential debts paid [Add any other particulars which may seem necessary]..			
						,, amount of dividend of in £ on proofs admitted for £—.....			
		—	—	—		,, Balance carried forward			

Assets not yet realised estimated to produce £ ———.

Creditors can obtain any further information by inquiry at the office of the official receiver or trustee of ———.

No. 80.

Notice of Dividend.

(*Title.*)

[Please bring this Dividend Notice with you.]

DIVIDEND OF ——— IN THE POUND.

[Address.]

———, 18—.

NOTICE IS HEREBY GIVEN that a ——— dividend of ——— in the Pound has been declared in this matter, and that the same may be received at ——— Office, as above, on ——— the ——— of ——— or on any subsequent Monday, between the hours of ———.

Upon applying for payment, this notice must be produced entire, together with any bills of exchange, or other securities held by you; and if you do not attend personally, you must fill up and sign the subjoined Forms of *Receipt and Authority*, when a cheque payable to your order will be delivered to the bearer.

To ———

———

(Signed)

G. H. [Trustee].

NOTE.—On application for the dividend, this notice must be produced entire, and the bills or other securities held by you must be produced.

RECEIPT.

———, 18—.

RECEIVED of ——— the sum of ——— Pounds ——— Shillings and ——— Pence, being the amount payable to ——— in respect of the ——— dividend of ——— in the £ on ——— claim against this estate.

£ : :

——— { *Creditor's Signature.*

AUTHORITY.

SIR,

Please deliver to _____ the

(Insert the name of the person who is to receive the cheque, or the words "me by post," if you wish the cheque sent to you in that way.)

cheque for the dividend payable to ——— in this matter.

——— { Creditor's Signature.

To ———.

———18 .

No. 82.

Certificate by Committee of Inspection as to Audit of Trustee's Accounts.

We, the undersigned, members of the committee of inspection in the matter of ———, a [*compounding or arranging debtor*], hereby certify that we have examined the foregoing account with the vouchers, and that to the best of our knowledge and belief the said account contains a full, true, and complete account of the trustee's receipts and payments on account of the estate.

A. B.
C. D. } Committee of Inspection.
E. F.

Dated ———.

No. 83.

Affidavit verifying Trustee's Account.

(*Title.*)

I, G. H., of ———, the trustee of the property of the above-named [*debtor*], make oath and say:

That **the account hereunto annexed marked B. contains a full and true account of my receipts and payments on account of the bankrupt's estate* from the ——— day of ——— to the ——— day of ——— inclusive,* *and that* I have not, nor has any other person by my order or for my use during such period, received any moneys on account of the said estate **other than and except the items mentioned and specified in the said account.*

Sworn at, &c.

**Note.*—If no receipts or payments, strike out the words in italics.

No. 84.

Annual Return to be made by Trustees in Bankruptcy.

Name of Debtor.	Court.	Number of Matter.	Date of receiving Order.	Amount of Liabilities.	Amount of Assets as estimated by		Balance 31st December, 18 .		Amount of Receipts from 31st December, 18 , to 31st December, 18 .	Payments from 31st December, 18 , to 31st December, 18 .						Balance 31st December, 18 .	
					Debtor.	Trustee.	In hand.	Due to Trustee		Extraordinary outlay.	Allowance to Debtor.	Expenses of Administration.	To Creditors.			In hand.	Due to Trustee
													Secured.	Preferential.	Unsecured.		
				[The amount should be taken from the debtor's statement of affairs, or if no statement has been filed the Trustee should estimate the amount.]													
Totals																	

Note.—Similar (separate) returns to be made in compositions and in schemes when a trustee is appointed to administer the debtor's property or manage his business.

No. 85.

Trustee's Trading Account.

(*Title.*)

G. H., the trustee of the property of the bankrupt in account with the estate.

RECEIPTS.					PAYMENTS.				
Dr.									*Cr.*
Date.					*Date.*				

G. H., Trustee.

We have examined this account with the vouchers and find the same correct, and we are of opinion the expenditure has been proper.

Committee of Inspection
[*or* Member of the Committee of Inspection].

No. 86.

Profit and Loss Account (*Trading Account*).

(*Title.*)

PROFIT and LOSS ACCOUNT.

Dr.					*Cr.*				
Stock on hand on ——— day of ———, 18—					Sales.....				
Purchases					Other receipts, if any....				
Trade expenses, viz.:—					Stock on hand on ——— day of ———, 18— ..				
Rent and taxes..									
Wages									
Miscellaneous ..									
Balance being profit.....									

G. H., Trustee.

Note.—This account to be submitted when the Committee of Inspection require, and in any case at the end of the trading or business carried on by the trustee.

No. 87.

Affidavit verifying Trustee's Trading Account.

(*Title.*)

I, G. H., of ——— the trustee of the property of the above-named bankrupt, make oath and say that the account hereto annexed is a full, true, and complete account of all money received and paid by me or by any person on my behalf in respect of the carrying on of the trade or business of the bankrupt, and that the sums paid by me as set out in such account have, as I believe, been necessarily expended in carrying on such trade or business.

Sworn, &c.

G. H., Trustee.

No. 91.

Application to Board of Trade to authorize Account at Local Bank.

(*Title.*)

We, the Committee of Inspection, being of opinion that Mr. G. H., of ———, the trustee in the above matter, should have an account at a local bank for the purpose of [*here insert grounds for application*], hereby apply to the Board of Trade to authorize him to make his payments into and out of the ——— Bank.

Dated ———.

L. M.
J. P. } Committee of Inspection.
E. F.

No. 92.

Order of Board for Local Account.

(*Title.*)

You are hereby authorized to make your payments in the above matter into and out of the ——— Bank.

By order of the Board of Trade,

To Mr. G. H., Trustee. J. S.

No. 93.

Notice to Creditors of Intention to apply for Release.

(*Title.*)

Take notice that I, the undersigned trustee [*or* late trustee] of the property of the bankrupt, intend to apply to the Board of Trade for my release, and further take notice that any objection

you may have to the granting of my release must be notified to the Board of Trade within twenty-one days of the date thereof.

A summary of my receipts and payments as trustee is hereto annexed.

Dated this ——— day of ——— 18—.

To K. L., Creditor. G. H., Trustee.

NOTE.—Section 82 of the Bankruptcy Act, 1883, enacts that "An order of the Board releasing the trustee shall discharge him from all liability in respect of any act done or default made by him in the administration of the affairs of the bankrupt, or otherwise in relation to his conduct as trustee, but such order may be revoked on proof that it was obtained by fraud or by suppression or concealment of any material fact."

No. 94.

Application by Trustee to Board of Trade for Release.

(*Title.*)

I, G. H., the trustee of the property of the bankrupt, do hereby report to the Board of Trade, as follows:—

That a composition [*or* scheme], under section 23 of the Act has been duly approved by the Court.

PRECEDENTS (*a*).

I. *DEED of* Conveyance *and* Assignment *by a* Debtor *of his* Real *and* Personal Property *for the benefit of his* Creditors. (*Concise form.*)

Parties. THIS INDENTURE, made the ——— day of ——— 18—, Between [*debtor*] of —— in the County of ——, builder, hereinafter called the debtor, of the first part; [*trustee*], of &c., hereinafter called the trustee, of the second part; and the several persons, companies and firms whose names and seals are subscribed and affixed in and to the schedule hereunder written, or who otherwise accede to these presents (*b*), of

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(*a*) Precedents Nos. I. to XIV. inclusive, are framed with special reference to cases of arrangements between debtors and creditors which are intended to operate independently of the provisions as to compositions, &c. contained in the Bankruptcy Act, 1883. The Precedents which follow comprise notices, resolutions, and instruments embodying terms of compositions and arrangements intended to be effected under sections 18 and 23 respectively of that statute. But Precedents of the former class, or clauses taken therefrom, will be found to be capable of adaptation for use in cases of statutory arrangement, and *vice versâ*. Of course, in adapting a Precedent framed specially with reference to assignments independent of the statute to the case of a statutory composition or scheme, some of the clauses will be superfluous, the powers and provisions contained therein being supplied by the statute.

(*b*) A deed purporting to be executed for the benefit of creditors, but to which the creditors are not actually parties or privies is regarded as a voluntary deed, and as such is revocable by the debtor at any time until it has been communicated to, or acted upon by, the creditors: *Garrard* v. *Lord Lauderdale*, 3 Sim. 1; *Acton* v. *Woodgate*, 2 My. & K. 492. See also the notes to *Ellison* v. *Ellison*, in 1 Wh. & Tud. L. C. Eq. 273, where the cases bearing on this question are collected. As to what constitutes a sufficient assent to bind a creditor and entitle him to the benefit of the trusts of an instrument of this description, see *ante*, p. 372.

As to the importance of obtaining, if possible, the assent of all creditors, see *ante*, p. 372. If this cannot be done, a clause should be inserted in the deed, empowering the trustee to arrange with non-assenting creditors: see *post*, p. 499.

the third part, WITNESSETH (*c*) as follows, that is to say:— *Testatum.*

1. The debtor, in consideration of the release hereinafter contained, hereby grants, assigns and conveys (*d*) to the trustee Conveyance by debtor of

(*c*) Recitals do not seem to be required in a creditor's deed, which is intended to operate independently of the statute; indeed it is well to omit them so as to avoid the risk of the deed being taken to amount to a notice by the debtor of his insolvency within sect. 4, sub-sect. 1 (h) of the Bankruptcy Act, 1883.

(*d*) Equitable interests in copyholds of the debtor will pass by this general conveyance of his real estate. If, however, the legal estate in any copyholds is vested in him, a covenant to surrender should be here inserted, for a form of which see *post*, Precedent III., clause 2, p. 505. By sect. 2 (v) of the Conveyancing Act, 1881, the word "conveyance" is to include a covenant to surrender "for the purposes of the Act," but this interpretation does not extend the meaning of the word "conveyance" for other purposes. As to copyholds.

This conveyance will also pass by way of assignment (with the exception of the specified particulars) all the assignable personal property of the debtor, including choses in action: *Rowe* v. *Dawson*, 1 Ves. 331; *Ryall* v. *Rowles*, 1 Ves. 338; and see the notes in 2 Wh. & Tud. L. C. Eq. 726, 729 *et seq.*; so, also, contingent interests: *Ivison* v. *Gassiot*, 3 De G., M. & G. 958; goodwill of a business: *Wedderburn* v. *Wedderburn*, 22 Beav. 84; *Robertson* v. *Quiddington*, 28 Beav. 529; *Ex parte Thomas*, 2 M., D. & De G. 294; book debts of a trader, *Smith* v. *Tims*, 1 N. R. 448; but not book debts of a solicitor relating to confidential matters: *Ex parte Roberts, Re Holden*, 12 W. R. 188; *Davidson* v. *Napier*, 1 Sim. 297; and property in British ships, see the Mercantile Shipping Amendment Act, 1862 (25 & 26 Vict. c. 63), s. 3.

There are, however, certain descriptions of property which are rendered incapable of assignment by statutory enactment, or held to be so on grounds of public policy. Property not capable of assignment.

The sale of any office touching or concerning the administration of justice is forbidden by the stat. 5 & 6 Edw. 6, c. 16; such offices are that of clerk of the peace: *Palmer* v. *Bates*, 2 Brod. & B. 673; of town clerk: *Ex parte Cossens*, 1 Buck. 541; of serjeant-at-mace of the City of London: *Lowfield's Case*, cit. 1 Ves. 212; of warden of a prison: *Huggins* v. *Bambridge*, Willes, 241; *Methwold* v. *Walbank*, 238; of parliamentary counsel to the Treasury: *Cooper* v. *Reilly*, 2 Sim. 560.

This statute extends to ecclesiastical as well as temporal offices which concern the administration of justice: 3 Cr. Dig. 109; *e. g.*, the offices of chancellor or registrar to a bishop: *Trevor's Case*, Cro. Jac. 269; of an archdeacon's registrar: *Woodward* v. *Foxe*, 2 Lev. 289.

But the statute does not extend to the offices of under-marshal of the City of London: *Ex parte Butler*, 1 Ves. 211; of caretaker of the House of Lords: *Schellinger* v. *Blackerby*, 1 Ves. 347; of deputy-registrar of the Prerogative Court of Canterbury: *Aston* v. *Gwinnell*, 3 Y. & J. 136; nor of bailiff of a hundred: *Godbolt's Case*, 4 Leon. 33.

I. Conveyance of Real and Personal Property for Benefit of Creditors.

ALL the real and personal estate, credits and effects whatsoever and wheresoever, and whether in possession, remainder, or reversion of the debtor (except (*e*) property held by him upon trust for any other person, and the bedding, tools of trade and wearing apparel of himself and his family), To HOLD the said real estate unto and to the use of the said trustee, his heirs and assigns [*or* in fee simple], and To HOLD the said personal estate unto the trustee, his executors, administrators and assigns [*or* absolutely]; but as to all the pre-

real and personal property to trustee.

A pension granted by Parliament "for the more honourable support of the dignity" of a person is inalienable: *Davis* v. *Duke of Marlborough*, 1 Swanst. 74. So, also, pensions granted to persons in the public service for the maintenance of the dignity of the office with a view to the performance of future duties: *Wells* v. *Foster*, 8 M. & W. 149. Pensions to incumbents of resigned benefices under the Incumbents' Resignation Act, 1871 (34 & 35 Vict. c. 44), are not transferable at law or in equity; see sect. 10 of that Act; and see the observations of *James*, L. J., in *Gathercole* v. *Smith*, 17 Ch. D. at p. 7. The assignment by an officer in the army or navy of his half-pay or retiring pension is invalid: see stat. 47 Geo. 3, c. 25, s. 4; and see *Flarty* v. *Odlum*, 3 T. R. 681; *Lidderdale* v. *Duke of Montrose*, 4 T. R. 248; *Lloyd* v. *Cheetham*, 3 Giff. 171; and the pensions of widows are within the statute: *Lloyd* v. *Cheetham*. So, also, an officer cannot charge or sell his full-pay: *Barwick* v. *Reade*, 1 H. Bl. 627. Military prize, when captured, is capable of being effectually assigned by the captor before any interest in it has been vested in him by a grant from the Crown: *Alexander* v. *Duke of Wellington*, 2 R. & My. 35. As to the amount to which a military officer is entitled on retirement in respect of his commission under the stat. 34 & 35 Vict. c. 86, s. 3, see *Johnstone* v. *Cox*, 19 Ch. D. 17.

The emoluments of a canonry have been held to be alienable: *Grenfell* v. *Dean of Windsor*, 2 Beav. 544; so, also, the income of the fellowship of a college: *Feistel* v. *King's College, Cambridge*, 10 Beav. 491.

Conveyance by debtor "as beneficial owner."

It will not generally be proper that the debtor should convey as beneficial owner, thereby covenanting by implication not merely for further assurance, but also for right to convey and for quiet enjoyment free from incumbrances, which covenants it has not hitherto been the usual practice to insert in deeds of this nature. A person so deeply involved in debt as to be compelled to enter into an arrangement of this description to satisfy his creditors is seldom in a position to do more than to covenant for further assurance. Where, however, the debtor's circumstances will permit, he may be made to convey "as beneficial owner," and in that case the express covenant for further assurance (*post*, p. 493) will be omitted.

Exceptions.

(*e*) As to what is a sufficient exception of property to prevent the assignment from being an act of bankruptcy, see *ante*, p. 384, n. (*d*); see also *post*, p. 496.

mises, hereinafter called the trust premises, upon the trusts and for the purposes hereinafter mentioned. I. Conveyance of Real and Personal Property for Benefit of Creditors.

2. The trustee shall, with all convenient speed, sell, dispose of, get in and convert into money the trust premises according to the nature thereof respectively, and shall hold the proceeds of such sale and conversion upon the trusts and for the purposes hereinafter mentioned (*f*). Trust for sale.

3. The trustee may, in his discretion, for the purposes of carrying out the trusts aforesaid, or any of them, enter into, execute, and do all such arrangements, assurances, and things as to him shall seem necessary or expedient. Provisions as to time and mode of sale, &c.

4. The trustee shall stand possessed of the proceeds of the sale and conversion of the trust premises, in trust, in the first place, to pay thereout all solicitors' and other costs, charges and expenses which shall have been or may be incurred in and about the negotiation, preparation and carrying out of these presents, and in the investigation of the affairs and realization and winding-up of the estate and effects of the debtor, including the remuneration of the trustee for his time and services at the rate of [*as agreed*], and in the next place to make any payments or allowances which would have preference or be entitled to be paid in full in case of bankruptcy; and in the next place to pay, divide and distribute the residue of the said trust moneys unto and amongst all and every the creditors of the debtor in like manner as in bankruptcy, and by such instalments, and at such times, as the trustee shall deem expedient; and to pay the surplus (if any) to the debtor (*g*). Trusts of proceeds of sale, &c.

5. The debtor hereby covenants with the trustee that he, the debtor, and all persons having or claiming any estate, right, title, interest or demand whatsoever, in, to, or out of the premises hereby conveyed, or any of them, or any part thereof respectively, shall from time to time, and at all times hereafter during the continuance of these presents, upon the request of the trustee, at the costs and charges of the trust estate, so long as the same shall be available for that purpose, For further assurance.

(*f*) As to the powers of trustees for sale as to the mode of conducting the sale, see sect. 35 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41); and as to the conditions under which they may sell, see sect. 3 of that Act, and sects, 2, 3 of the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78).

(*g*) Even though a deed of assignment for the benefit of creditors may not constitute an act of bankruptcy, as being either an assignment of all the debtor's property for the benefit Distribution of debtor's property.

I. Conveyance of Real and Personal Property for Benefit of Creditors.

and afterwards of the persons requiring the same, make, do, and execute all such acts, deeds, assignments, and assurances for the better and more perfectly granting and assigning, or otherwise assuring to the trustee, in such manner as he shall direct, upon the trusts of these presents, all or any of the premises hereinbefore expressed to be hereby granted and assigned respectively, or any part thereof respectively.

Power of attorney.

6. The debtor hereby, for the consideration aforesaid, appoints the trustee and his nominees to be his attorney and attorneys in his name or otherwise, and on his behalf to execute, sign, and do all such deeds, documents, assurances, acts and things, as may be found necessary or expedient in relation to the trusts of these presents and the trust estate, and to give effectual releases and receipts, and to

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of his creditors generally within sub-sect. 1 (a) of sect. 4 of the Bankruptcy Act, 1883, or as being a "fraudulent preference" within sub-sect. 1 (c) of the same section, it may not in some cases be absolutely free from doubt whether it will not constitute an act of bankruptcy, as being tantamount to a notice by the debtor that he has suspended, or that he is about to suspend, payment of his debts within sub-sect. 1 (h) of the same section: but see *Ex parte Oastler*, 13 Q. B. B. 471, *ante*, p. 390. It will, therefore, sometimes be advisable for the trustee, where any of the creditors decline to execute or accede to the deed, not to proceed to distribute the property of the debtor till the expiration of three months from the date of the execution of the deed; after which period no bankruptcy petition can be presented against the debtor founded upon the execution of the deed (sect. 6, sub-sect. 1 (c)); nor will any bankruptcy of the debtor relate back to the act of bankruptcy (if such it be), if three months have elapsed thereafter: sect. 43, *ante*, p. 445. The trustee may, during the three months, leave the chattels and effects of the debtor in his possession without registering this deed under the Bills of Sale Acts: see stats. 41 & 42 Vict. c. 31, s. 4; 45 & 46 Vict. c. 43, s. 3.

Liability of the trustee of a creditor's deed on the subsequent bankruptcy of the debtor.

A debtor executed a creditor's deed, under the provisions of which the trustee thereby appointed took possession of the property and carried on the business of the debtor; the debtor was subsequently adjudicated bankrupt on the petition of some creditors who had not assented to the deed, the act of bankruptcy alleged in the petition being the execution of the deed: it was held that the official receiver was entitled to treat the trustee of the deed either as an agent or as a trespasser. In the former case, the receiver would be entitled to an account of the carrying on of the business, and of the profits which the trustee of the deed had made, or ought to have made; in the latter case, the trustee must deliver to the receiver any property of the bankrupt which remained unconverted, and the value (at the time when possession was taken) of any property which had been converted: *Ex parte Vaughan, Re Riddeough*, 14 Q. B. D. 25.

nominate and appoint, and in the discretion of him or them, to remove any substitute or substitutes; the debtor and the creditors, parties hereto of the third part, hereby agreeing to confirm and abide by whatsoever the said attorney or attorneys shall do, or cause to be done, in relation to the premises.

Release of debtor.

7. The creditors, parties hereto of the third part, hereby respectively acquit, release, and discharge the debtor, his heirs, executors and administrators, from all debts and sums of money now due and owing from the debtor to such creditors respectively, and from all actions, suits, debts, claims, and demands whatsoever, which such creditors now have against the debtor, subject nevertheless to the provisions hereinafter contained.

Saving of rights of secured creditors.

8. Notwithstanding anything herein contained any creditor at the time of executing these presents having any lien or security, or the suretyship of any person, may assent to and execute these presents without prejudice to his rights under such lien, or security, or suretyship; but any creditor so assenting who may hold any such security upon the estate or effects of the debtor shall be entitled to dividends under the trusts of these presents only on the balance of his debt remaining after giving credit for the value of the security held by him in like manner as in bankruptcy, such value to be ascertained either by the realisation of his security by the creditor, or by agreement between such creditor and the trustee, or by arbitration in manner next hereinafter provided.

Arbitration clause.

9. If any dispute or difference shall arise in the carrying out of the trusts of these presents between the trustee and any person claiming to be a creditor of the debtor, and entitled to the benefit of the said trusts, the same shall be settled and disposed of by two arbitrators, one to be named by each party, or by an umpire to be chosen by such arbitrators before entering on the reference in manner provided by the Common Law Procedure Act, 1854, and all the provisions of that Act relating to references to arbitration, so far as the same are applicable, shall apply hereto.

Power for creditors to appoint new trustees.

10. It is hereby agreed and declared that the power of appointing a new trustee or trustees of these presents in the place of any trustee or trustees who shall die or desire to be discharged, or refuse, or become unfit or incapable to act, shall be exerciseable by the majority in value of the creditors, parties hereto of the third part.

In witness, &c.

Schedule of Creditors.

II. *DEED OF ASSIGNMENT of* PERSONALTY *by a* DEBTOR *upon* TRUSTS *for the benefit of his* CREDITORS; COVENANT *by* DEBTOR *to* ASSURE REALTY, *&c., if required*; RELEASE *of* DEBTOR.

Parties.

THIS INDENTURE, made the ——— day of ——— 18—, BETWEEN [*debtor*], of ———, in the county of ———, of the first part; [*trustee*], of &c., and [*trustee*], of &c., of the second part; and the several persons being creditors of the said [*debtor*] whose names and seals are subscribed and affixed in and to the schedule hereunder written, or who otherwise accede to these presents, of the third part, WITNESSETH as follows:—

Testatum.

Interpretation clause.

1. In the construction of these presents (unless a contrary intention appears) the term "the debtor" means the said [*debtor*]; the term "the trustees" includes the said [*trustees*] and the survivor of them, and the executors or administrators of such survivor, their or his assigns, and the trustees or trustee for the time being of these presents; and the term "the creditors" includes the parties hereto of the third part, and all other the creditors of the debtor at the date of these presents, of whom the trustees shall have notice before completing the distribution of the property of the debtor hereby assigned, under the trusts of these presents; and words in the singular number mean also the plural; and words in the plural number mean also the singular; and words denoting males include females; and words denoting persons include corporations, companies and partnership firms in the United Kingdom and elsewhere.

Assignment of personalty, except leaseholds, &c.

2. In consideration of the release hereinafter contained, the debtor hereby assigns to the parties hereto of the second part ALL his household furniture, goods, credits, moneys, and securities for money, and all other his personal estate and effects whatsoever and wheresoever, and whether in possession, remainder or reversion (except (*a*) leaseholds and property held by him in trust for any other person; and also except shares in any company or undertaking, and the necessary wearing apparel of himself and his family), To HOLD all the said

Exception of leaseholds, shares, &c.

(*a*) As to exceptions, see *ante*, p. 384, n. (*d*). The exception in the text will be substantial or not, according to the nature of the debtor's property; it has, at all events, the recommendation of not imposing on the trustees risks and liabilities incident to property which may prove to be of an onerous nature.

premises hereby assigned to the parties hereto of the second part, subject to the mortgages, charges and incumbrances now affecting the same premises respectively, And upon the trusts and with and subject to the powers, provisoes, agreements and declarations hereinafter contained of and concerning the same.

II. Assignment of Personalty for Benefit of Creditors and Covenant to assure Realty.

And it is hereby agreed and declared as follows:

3. The trustees shall, when and as they shall think proper, get in and collect such parts of the premises hereby assigned as shall consist of money, and sell and convert into money such parts of the same premises as shall not consist of money, with full power to effect the sale of any policy of assurance, whether by way of surrender to the office wherein the same was effected or otherwise; and for the purposes aforesaid to execute and do all such assurances and things as they may think necessary or expedient; And shall hold the proceeds of such getting in, collection, sale, and conversion upon the trusts, and for the purposes hereinafter mentioned.

Trust for sale and conversion.

4. The trustees shall out of the moneys which shall come into their hands under the trusts of these presents, or under or by virtue of any assurance which may hereafter be made by the debtor in pursuance of the covenant in that behalf hereinafter contained, in the first place pay and retain all costs, charges and expenses of negotiating this arrangement, and of preparing, engrossing, and executing these presents, and of investigating the accounts and affairs of the debtor, and of such getting in, collection, sale, and conversion as aforesaid, and all other costs, charges and expenses incurred, or to be incurred, in and about the carrying into effect the trusts, powers, and provisions of these presents, including the remuneration of the trustees for their time and services at the rate of [*as agreed*]; And in the next place shall pay and divide the remainder of said moneys rateably among the creditors in like manner as if the debtor had been at the date of these presents adjudicated a bankrupt; And shall pay the ultimate surplus (if any) to the debtor.

Trusts of proceeds of sale, &c.

Provided always, and it is hereby agreed and declared as follows:—

Provisions for conduct of the winding-up of the debtor's affairs.

5. The trustees may, subject to the provisions hereinafter contained, out of the moneys which shall come into their hands by such getting in, collection, sale, and conversion into

As to payment of dividends.

II. Assignment of Personalty for Benefit of Creditors and Covenant to assure Realty.

money as aforesaid, from time to time pay to the creditors rateably dividends in proportion to their respective debts or claims, at such respective dates and as often and at such rates as the trustees shall think proper, until such debts or claims shall be fully paid and satisfied.

Power for trustees to manage property till sale;

6. The trustees may, until the premises hereby asssigned shall be got in, collected, sold, and converted into money respectively as aforesaid, manage and deal with the same as they shall think most beneficial in the interests of the creditors, with full power to expend such sums as they shall think necessary or expedient in repairing, amending, or insuring against loss or damage by fire the premises or any part thereof.

to employ persons at salaries;

7. The trustees may, if they shall think fit, employ the debtor or any other person in winding-up the affairs of the debtor, and in getting in, collecting, selling, and converting into money the premises hereby assigned, or any of them or any part thereof, and generally in or about the carrying out of the trusts and provisions of these presents, at and with such salaries, allowances, or payments as the trustees shall think proper.

to deposit moneys, &c., with bankers.

8. The trustees may deposit all moneys, cheques, bills of exchange, notes of hand, and securities for money, which shall come into their hands under the trusts of these presents, with such bankers as the trustees shall think proper.

No assenting creditor to negotiate bills without memorandum of assent.

9. No creditor who shall have executed or otherwise acceded to these presents shall negotiate any bill of exchange or other negotiable instrument without having first endorsed thereon a memorandum in writing of such execution or accession.

As to proof of debts.

10. Debts or claims, which would have been proveable against the estate of the debtor if the same were being administered in bankruptcy, shall be deemed to be debts or claims within the meaning of these presents, and shall be proveable in like manner against the trust estate hereunder.

Power for trustees to pay creditors full amount of secured debts;

11. The trustees may, in their discretion, out of the moneys which shall come into their hands under the trusts of these presents, pay to any of the creditors who may hold any mortgage, charge, lien, or other security upon any part of the premises hereby assigned, the full or any less amount, as may be agreed between the trustees and any such creditor, of the debt so secured for the purpose of obtaining possession of the property comprised in or subject to such security; provided always, that the amount so paid shall not in the

II. Assignment of Personalty for Benefit of Creditors and Covenant to assure Realty.

judgment of the trustees exceed the value of the property comprised in or subject to such security; and may also in their discretion, out of such moneys as aforesaid, from time to time keep down the interest payable in respect of any mortgage, charge, or other incumbrance affecting the trust premises, or any of them or any part thereof.

to require assenting creditors to verify claim;

12. The trustees may, by writing under their hands, require the creditors, or any of them, to verify their respective claims or claim by statutory declaration or other satisfactory evidence; and no creditor who shall in writing have acceded to or approved of these presents, and who shall refuse or neglect to comply with any such request, shall be entitled to participate in any dividend under these presents until he shall have verified his claim to the satisfaction of the trustees.

to make valuations of claims;

13. The trustees may cause the debts or claims of the creditors, or any of them, to be valued or assessed, for the purpose of ascertaining or verifying the amount of the proofs thereof respectively, and generally for the purposes of these presents, and may employ any such actuary or accountant as the trustees shall think fit for the purposes of any such valuation or assessment.

to arrange with non-assenting creditors;

14. The trustees, in their discretion, may also pay in full, or make such compromises or arrangements with any creditor or creditors, secured or otherwise, of the debtor who shall refuse to execute, or accede to, or approve of these presents, for the payment or satisfaction of his or their respective claim or claims, and may pay the costs of any such creditor or creditors who shall institute any proceeding against the debtor for recovery of his or their respective claim or claims.

to arrange as to debts due to the debtor;

15. The trustees may also enter into and carry out any such compromises or arrangements as they shall think expedient in the interests of the creditors for ascertaining, settling, compounding or giving time for payment of debts due to the debtor.

to submit disputes to arbitration.

16. If any dispute or difference shall arise between the trustees and any person whomsoever in or about the carrying into effect any of the trusts, powers, or provisions of these presents or otherwise with respect to the trust estate, the trustees may refer the same to arbitration in the usual manner, and abide by the award made upon such reference.

And generally to act as they think best in the interests of the creditors.

17. And generally the trustees may, in their discretion, without having any further or other authority from the creditors than that intended to be conferred upon them by

II. Assignment of Personalty for Benefit of Creditors and Covenant to assure Realty.

these presents, from time to time and at all times hereafter, until the trusts and provisions hereof shall have been fully executed and carried into effect, take such proceedings, give such directions, and generally do and authorize and permit to be done all such acts and things as the trustees shall in their judgment think expedient in the interests of the creditors.

Covenants by debtor.

And the debtor hereby covenants with the trustees, and as a separate covenant with each of the creditors, as follows:—

To make and deliver account of his assets and liabilities;

18. The debtor shall, with all convenient speed, and also from time to time hereafter, whenever the trustees shall so require in writing, make and deliver to them, to their satisfaction, full, true, and particular accounts signed by him of all his estate, effects and credits, including leaseholds and shares in any company or undertaking, with the charges and liabilities affecting the same respectively, and also of all his debts, engagements and liabilities, together with the names and addresses, and occupations of all his creditors, whether parties to these presents or otherwise; and shall, if the trustees shall so require, verify the accounts so to be made by him as aforesaid by statutory declaration or other satisfactory evidence; and generally shall give to the trustees such assistance and information to the utmost of his power as by them shall be reasonably required.

for further assurance;

19. [*Covenant for further assurance of premises* "assigned," see *ante*, p. 493.]

to assure realty, leaseholds and shares when required by the trustees (*a*).

20. The debtor and every person having or claiming any estate or interest in any freehold or copyhold hereditaments, or in any leaseholds or shares of the debtor, shall at all times hereafter during the continuance of the trusts of these presents, if and whenever required by the trustees in writing, at the costs and charges of the trust estate, and in such manner as the trustees shall direct, effectually convey, grant, surrender, or cause to be surrendered, assign, or otherwise assure, such freehold, copyhold and leasehold premises and shares, or any of them, or any part thereof respectively, according to the tenure or nature thereof respectively, unto or to the use of the trustees or such other persons as shall be named

(*a*) For a precedent of an assurance of realty of a debtor in pursuance of this covenant, see Precedent III., *post*, p. 503; see also p. 504, note (*a*).

II. Assignment of Personalty for Benefit of Creditors and Covenant to assure Realty.

by them in writing for that purpose, subject to the charges and incumbrances affecting the same premises respectively, upon trust to sell and convert into money the same, and to hold and apply the proceeds of such sale and conversion, with the powers, upon the trusts, for the purposes, subject to the provisions, and generally in manner hereinbefore declared and mentioned concerning the proceeds of the sale and conversion of the trust premises hereby assigned, or as near thereto as circumstances will admit: And thereupon the debtor and every person having or claiming any such estate or interest as aforesaid shall deliver over all deeds, writings and things in or under their respective possession, custody or control, in anywise relating to the said freehold, copyhold and leasehold premises and shares, or any of them, or any part thereof respectively; and shall execute and do all such assurances and things, and give all such information and explanation for effectuating the purposes aforesaid, or any of them, as by the trustees shall be reasonably required: Provided always that the debtor shall, if the trustees shall so require, verify the particulars of the said premises hereinbefore covenanted to be assured by statutory declaration or other sufficient evidence.

And meanwhile, not to alienate or charge the premises.

21. The debtor, his heirs, executors, or administrators shall not, without the consent in writing of the trustees, alienate, charge or encumber the said premises hereinbefore covenanted to be assured, or any of them, or any part thereof respectively, or the rents, profits or income thereof, or of any part thereof.

Power of attorney.

22. [*Power of attorney, ante*, p. 493.]

Release of debtor.

23. In consideration of the premises the trustees and also the creditors do hereby respectively (but subject to the stipulations and declarations hereinafter contained (*b*)) release the debtor, his heirs, executors and administrators, and his and

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Release.

(*b*) These words specially refer to the provision in clause 24, reserving the rights of creditors holding securities to enforce the same, and of creditors generally as against sureties, &c. An absolute release of the debtor is strictly inconsistent with a reservation of rights against sureties: *Lewis* v. *Jones*, 4 B. & C. 506; *Kearsley* v. *Cole*, 16 M. & W. 128; *Webb* v. *Hewitt*, 3 K. & J. 438. But where such a reservation is made, the Court will, if satisfied that such is the intention of the parties, construe the release as a mere covenant not to sue: *Warwick* v. *Richardson*, 14 Sim. at p. 296. See also *Thompson* v. *Lack*, 3 C. B. 540; *Price* v. *Barker*, 4 E. & B. 760.

II. Assignment of Personalty for Benefit of Creditors and Covenant to assure Realty.

their estates and effects from all accounts, actions, claims and demands which they, the creditors, now have or claim, or may hereafter or might but for these presents have or claim, against the debtor on account of their respective debts or securities, and all interest for the same respectively.

Provided always, and it is hereby agreed and declared as follows:—

Saving rights of creditors as to securities and against sureties, &c.

24. Nothing herein contained shall prejudice any security of any creditor, and every creditor shall retain all his rights against any persons other than the debtor (*c*) as if these presents had never been executed, and for the sake of conformity alone the debtor, his heirs, executors, or administrators may be joined in any actions, suits, or other proceedings to be brought or instituted by any of the said creditors against any such other person.

Avoidance of release in case of fraud by debtor.

25. In case the debtor has concealed or kept back any part of his estate to the value of 20*l.* (except the wearing apparel hereinbefore expressed to be excepted from the assurance hereby made), then the release hereinbefore contained shall be void.

Trustees' indemnity clause.

26. And the parties hereto of the third part hereby jointly and severally covenant with the trustees, and each of them, that, in addition to the ordinary indemnity and right to reimbursement given by law to trustees, the trustees shall be indemnified and saved harmless by the now covenanting parties according and in proportion to the amount of their respective debts against and in respect of all transactions and personal engagements and things whatsoever which the trus-

Effect of release of debtor as regards sureties.

(*c*) A surety will generally be discharged from his liability under the contract by any dealing on the part of the creditor, whereby the surety may be prejudiced either in his liability to the creditor, or in his remedies against the principal debtor. So if a creditor gives time to the principal debtor, the surety will be discharged. See on this point, *ante*, tit. Bonds, p. 286. And if a creditor accepts a composition in satisfaction of his debt, and wishes to retain his rights against sureties, he must do so by a special reservation of such rights made at the time when the arrangement is entered into: *Ex parte Wilson*, 11 Ves. 410; *Boultbee* v. *Stubbs*, 18 Ves. 20; *Cowper* v. *Smith*, 4 M. & W. 519; *Owen* v. *Homan*, 4 H. L. C. 997. The effect of such a reservation is to keep alive the sureties' rights against the principal: *Close* v. *Close*, 4 De G., M. & G. 176; and that notwithstanding that the surety is himself a party to the composition deed containing the reservation: *Kearsley* v. *Cole*, 16 M. & W. 128. The reservation of the rights of creditors should be made in express terms on the face of the composition deed: *Ex parte Glendinning*, Buck. 517.

tees shall respectively lawfully do, or enter into, direct, or sanction, in or concerning the trust estate and moneys under these presents or in relation thereto; and the now covenanting parties shall ratify, confirm and abide by the same transactions, engagements and things in all respects, but so that none of the now covenanting parties shall by virtue of this covenant be liable to pay a larger sum than the amount of his debt.

II. Assignment of Personalty for Benefit of Creditors and Covenant to assure Realty.

27. And it is hereby agreed and declared that the power of appointing a new trustee or trustees of these presents in the place of any trustee or trustees who shall die, or desire to be discharged, or refuse, or become unfit or incapable to act, shall be exerciseable by the majority in value of the creditors.

Power for creditors to appoint new trustees.

28. If at any time hereafter the trustees shall certify in writing under their hands that these presents have not then been duly executed, or otherwise in writing assented to or approved of by all or by a majority of not less than [*insert* "three-fourths" *or other proportion determined on*] in number and [*insert proportion*] in value of all the creditors of the debtor of whose claims the trustees shall then have notice, or that it shall have been found impossible or inexpedient in the interests of the creditors who shall then have executed, or assented to, or approved of these presents as aforesaid, to make arrangements with dissentient or non-assenting creditors of the debtor, then these presents, and everything herein contained, shall, except (*e*) as to anything theretofore done in pursuance hereof, and without prejudice to any right of action or other proceeding theretofore accrued hereunder, cease and become void.

Avoidance of trust deed on certificate of trustees (*d*).

In witness, &c.

Schedule of Creditors.

III. *Conveyance by* Debtor *to* Trustees *of* Freeholds, Copyholds *and* Leaseholds *in* Trust *for* Sale *in pursuance of a* Covenant *in a* Trust Deed *for the benefit of* Creditors (Precedent II.); *or in contemplation of such a* Trust Deed (Precedent V.).

THIS INDENTURE, made the ——— day of ———, 18—, Between [*debtor*], of ———, in the county of ———, Esquire,

Parties.

(*d*) This clause is taken from the case of *Hickson* v. *Barclay*, 3 H. & C. 361.

(*e*) As to the exception from the avoidance of things theretofore done, see *Irving* v. *Gray*, 3 H. & N. 34.

III. Conveyance of Freeholds, Copyholds and Leaseholds on Trust for Sale.

of the one part, and [*trustee*], of &c., and [*trustee*], of &c., of the other part. WHEREAS the said [*debtor*] is desirous of selling and converting into money the lands and hereditaments hereinafter expressed to be hereby assured, and the said [*trustees*] have agreed to effectuate his said desire and to carry out such sale on having such assurance to them of the premises as is hereinafter contained: NOW THIS INDENTURE WITNESSETH as follows:—

Recital of debtor's desire to convert his property into money.

Testatum.

Grant of freeholds.

1. The said [*debtor*], in pursuance of the said agreement and in consideration of the premises, hereby, in exercise of every power him hereunto enabling, appoints, and by virtue of every his estate and interest grants unto the said [*trustees*] (*a*) all the freehold messuages, tenements, lands and hereditaments whatsoever and wheresoever of or to which the said [*debtor*] or any person or persons in trust for him is or are seised or entitled in possession, remainder or reversion, for an estate of freehold of inheritance, or for the life of the said [*debtor*] or any other person, To HOLD the same unto and to the use of the said [*trustees*] their heirs and assigns, SUBJECT to the charges and incumbrances now affecting the same premises respectively; AND upon the trusts and for the purposes hereinafter declared and expressed concerning the same.

Mode of conveying realty, &c., on trust for sale for benefit of creditors.

(*a*) Inasmuch as the conveyance by a debtor of the whole, or of the whole with an inconsiderable exception, of his property (see *ante*, p. 384, n. (*d*)) is an act of bankruptcy, and liable to be set aside accordingly, as against all persons having notice of the act, it is generally advisable that the real estate and leaseholds of debtors should be conveyed by a deed so framed as not to give notice to a purchaser that an act of bankruptcy may have been committed by the debtor in making such conveyance, and that the trusts of the proceeds of sale should be declared by a separate instrument. This course is also recommended by the consideration that it is generally advisable to avoid complicating documents of title to land by the insertion therein of provisions relating to other matters.

The Precedent in the text is equally adapted to a conveyance in pursuance of the covenant to convey real property and leaseholds contained in an assignment of a debtor's personalty in trust for his creditors (see Precedent II.), or to a conveyance in contemplation of such an assignment (see Precedent V.). In the former case, a declaration of trusts of the proceeds of the sale of the real estate, &c. (see Precedent IV.) should be appended to or endorsed upon the deed of assignment. Of course no reference must be made in the recitals or elsewhere in this conveyance to the previous or subsequent trust deed, as the case may be.

III. Conveyance of Freeholds, Copyholds and Leaseholds on Trust for Sale.

2. The said [*debtor*], in further pursuance of the said agreement and for the consideration aforesaid, hereby covenants with the said [*trustees*] that the said [*debtor*], or his heirs and all other necessary parties (if any), will forthwith, at the cost of the trust estate, surrender or cause to be surrendered into the hands of the lord or lady, or lords or ladies, of the manor or respective manors whereof the hereditaments hereby covenanted to be surrendered may be holden, according to the custom of the said manor or respective manors, All the copyhold and customary messuages, tenements, lands, and hereditaments whatsoever or wheresoever, of or to which the said [*debtor*], or any person or persons in trust for him, is or are seised or entitled in possession, remainder, or reversion, for an estate of customary freehold of inheritance, or for the life of the said [*debtor*] or any other person, To THE USE of the said [*trustees*], their heirs and assigns, at the will of the lord or lady, or lords or ladies, of the said manor or respective manors, according to the custom or respective customs of the said manor or manors, by and under the rents, fines, suits, and services, therefor respectively due and of right accustomed, SUBJECT to the charges and incumbrances now affecting the same premises respectively; AND upon the trusts and for the purposes hereinafter declared and expressed concerning the same: AND FURTHER, that until the said copyhold and customary premises shall have been surrendered pursuant to the covenant in that behalf hereinbefore contained, the said [*debtor*] and his heirs will stand possessed of the same upon trust to surrender the same pursuant to such covenant, and subject thereto upon the trusts, for the purposes, and with and subject to the powers and provisions upon, for, with, and subject to which the same premises would be held if such surrender had actually been made.

Covenant to surrender copyholds.

[3. The said [*debtor*], in further pursuance of the said agreement and for the consideration aforesaid, hereby assigns unto the said [*trustees*] all the leaseholds, messuages, tenements, and lands whatsoever and wheresoever, of or to which the

[Assignment of leaseholds] (*b*).

(*b*) If the leaseholds are held at a rack rent or subject to onerous covenants, it will be well to omit this assignment; in such a case a covenant to assign leaseholds as the trustees direct may be substituted for the assignment, which covenant may be easily framed by referring to Precedent II. clause 20, *ante*, p. 500, omitting words applicable to property other than leaseholds.

As to leaseholds.

III. Conveyance of Freeholds, Copyholds and Leaseholds on Trust for Sale.

said [*debtor*] or any person or persons in trust for him is or are entitled in possession, reversion, or remainder, To HOLD the same for the terms, at the rents, and subject to the covenants and conditions for, at, and subject to which the same are holden respectively, SUBJECT to the charges and incumbrances now affecting the same respectively; AND upon the trusts and for the purposes hereinafter declared and expressed concerning the same.]

Trusts—

AND IT IS HEREBY AGREED and declared as follows:—

for sale of debtor's property;

4. The said [*trustees*] shall stand seised and possessed of the premises hereby appointed, granted, [and] covenanted to be surrendered, [and assigned] respectively (which are hereinafter referred to as the trust premises), according to the nature and quality of the same respectively, Upon trust that they or the survivor of them, or the heirs, executors, or administrators of such survivor, or other the trustees or trustee for the time being of these presents (who are hereinafter referred to collectively as the trustees) shall at such times and in such manner as they or he shall think fit, sell and convert into money the trust premises, with power for the purposes of and incident to such sale and conversion to execute and do all such assurances and things as they or he shall think fit, and shall hold the proceeds of such sale and conversion upon the trusts and for the purposes hereinafter declared and expressed concerning the same.

of proceeds of sale and conversion.

5. The trustees shall, out of the moneys which shall come into their hands under the trusts of these presents, pay and retain all costs, charges, and expenses of and incident to the execution of the trusts and powers of these presents, and to pay the surplus to the said [*debtor*].

Powers of trustees—

PROVIDED ALWAYS, and it is hereby agreed and declared as follows:—

to manage property till sale;

6. The trustees may, until the trust premises shall be sold or converted into money as aforesaid, manage or superintend the management of the same, with full power [to fell timber or cut underwood from time to time, for sale, or for repairs or otherwise, and] to repair buildings, and to continue to work mines, minerals, and quarries, which have usually been worked, and to drain or otherwise improve land, and to

insure against loss or damage by fire or otherwise, and generally deal with the premises in a proper and due course of management.

III. Conveyance of Freeholds, Copyholds and Leaseholds on Trust for Sale.

7. The trustees may enter into arrangements with mortgagees or incumbrancers of the trust premises, or any part thereof, for selling and conveying to them the property so mortgaged or incumbered, at such prices and on such terms as the trustees shall think fit.

to convey property to incumbrancers;

8. The trustees may, in their discretion, pay any incumbrancer holding a mortgage, charge, or other security upon the trust premises or any part thereof, in full or otherwise, the amount of his debt or claim so secured, for the purpose of obtaining possession of the property so incumbered, but so that the moneys so paid do not in the judgment of the trustees exceed the value of the property so incumbered.

to pay incumbrancers in full.

And the said [*debtor*] hereby covenants with the trustees as follows:—

Covenant by debtor—

9. The said [*debtor*], and every person having or claiming any estate, right, or interest in the trust premises, or any part thereof, shall at all times, at the request of the trustees, and at the cost of the trust estate, execute and do all such assurances and things for further or more perfectly assuring unto and to the use of the trustees all or any part of the trust premises, subject and in manner aforesaid, and enabling them to obtain possession of, sell, and convert into money the same, and generally to execute the trusts and powers of these presents as by the trustees shall be reasonably required.

for further assurance.

In witness, &c. (*c*).

(*c*) No express form of appointing new trustees is here given, and accordingly the statutory form given by the Conveyancing and Law of Property Act, 1881, will be exerciseable for that purpose. The trustees should enter into an undertaking with the assenting creditors that vacancies shall be filled up by appointment of a nominee of such creditors, being the person appointed as trustee of the trust deed (Precedent II. or V.). As to the statutory power of appointing new trustees, see tit. Appointment of New Trustees, *ante*, p. 6.

Appointment of new trustees.

IV. *AGREEMENT declaring* TRUSTS *of* PROCEEDS OF SALE *of* REAL ESTATE, *&c. of a Debtor (to be endorsed on or annexed to Deed of Assignment of Personalty upon Trusts for the benefit of his Creditors,* Precedent II.).

Parties.

AN AGREEMENT made the ——— day of ———, 18—, BETWEEN the within- [*or* above-]named [*debtor*] of the one part, and the within- [*or* above-]named [*trustees*] of the other part:

Recital of conveyance of even date.

WHEREAS by an indenture of even date with these presents, and made between the same parties as are parties to these presents and in the same order, all the freehold, copyhold, and customary hereditaments and leaseholds of the said [*debtor*] were, in pursuance of the covenant in that behalf contained in the within- [*or* above-]written indenture, appointed, granted, covenanted to be surrendered and assigned unto or to the use of the said [*trustees*], their heirs, executors or administrators, according to the tenure or nature of the same premises respectively, but subject to the charges and incumbrances affecting the same respectively, upon trust that the trustees or trustee for the time being of the indenture now in recital should sell and convert into money the same premises, and should stand possessed of the proceeds of such sale and conversion upon trust after payment thereout of the costs and expenses of and incident to the said sale and conversion, and the execution of the trusts and powers of the said indenture, to pay the surplus of the said proceeds to the debtor:

Testatum.

NOW THESE PRESENTS WITNESS,

Declaration of trust.

and it is hereby agreed and declared that the said [*trustees*] or the survivor of them, or other the trustees or trustee for the time being of the said indenture of even date with these presents, shall stand possessed of all the surplus (if any) of the moneys which shall come into their hands under or by virtue of the trusts of the same indenture, and which are thereby made payable to the said [*debtor*], upon the same trusts, for the same purposes, and with, under, and subject to the same powers, conditions, and declarations as are in the within- [*or* above-] written indenture declared and contained of or concerning the proceeds of the sale and conversion of the premises thereby assigned, or as near thereto as the circumstances of the case will admit. AS WITNESS, &c.

V. *TRUST DEED for the* BENEFIT *of* CREDITORS, *declaring Trusts of* PROCEEDS OF SALE *of* REAL PROPERTY *and* LEASEHOLDS *previously conveyed by a Debtor* (see Precedent III.).

THIS INDENTURE, made the ——— day of ———, 18—, BETWEEN [*debtor*], of ———, in the county of ———, Esquire, hereinafter called the debtor, of the first part; [*trustee*], of &c., and [*trustee*], of &c., of the second part; and the creditors of the said [*debtor*] who execute, as appears by the schedule hereto, or otherwise accede to these presents, of the third part; and supplemental to an indenture bearing even date with these presents, and made between the said [*debtor*] of the one part, and the said [*trustees*] of the other part, being a conveyance and assignment by the said [*debtor*] to the said [*trustees*] of all the real property and leaseholds of the debtor, upon trust for sale as therein mentioned: WITNESSETH as follows:— Parties. *Testatum.*

1. [*Insert interpretation clause, ante*, p. 495, *and add:*] and the expression "the principal indenture" shall mean the said indenture of even date with these presents. Interpretation clause.

2. [*Assignment by debtor of personalty, except leaseholds, &c., ante*, p. 496], but including the surplus (if any) payable to the debtor of the moneys which shall come into the hands of the trustees under the trusts and provisions of the principal indenture, TO HOLD all, &c. [*ut ante*, p. 496]. Assignment including surplus proceeds of sale.

AND IT IS HEREBY AGREED and declared as follows:

3. [*Trusts for sale, &c. of property assigned, ante*, p. 497.]

4. [*Trusts of proceeds of sale, &c., viz., to pay costs, &c.*, "including the costs of and incident to the principal indenture and these presents, and the carrying the same respectively into effect; AND to apply," &c., *ut ante*, p. 497]. Trusts for sale, and of proceeds of sale, &c.

PROVIDED ALWAYS, and it is hereby agreed and declared,

[*Power for trustees to pay dividends; to manage property till sale; to employ persons at salaries; to make allowance to debtor; to deposit moneys with bankers; provisions as to nego-* Trustees' powers.

V. Declaration of Trusts of Proceeds of Sale for Benefit of Creditors.

tiation of bills of exchange by assenting creditors; as to proof of debts; powers for trustees to pay secured creditors in full; to require claims to be verified; to make valuations of claims; to arrange with non-assenting creditors; to arrange with debtors of the debtor; to submit disputes to arbitration; and generally to deal with the property in the interests of the creditors, as in Precedent II., clauses 5 to 17 inclusive.]

And the debtor hereby covenants with the trustees, and as separate covenants with each of his creditors, as follows:—

[*Covenant to deliver statement of accounts, liabilities and property, and for further assurance, as in Precedent II., clauses* 18, 19, *ante*, pp. 499, 500.]

To assure shares when required.

20. The debtor, and every person having or claiming any estate or interest in any shares of the debtor, shall at all times hereafter during the continuance of the trusts of these presents, if and whenever required by the trustees, in writing, at the expense of the trust estate, and in such manner as the trustees shall direct, effectually assure such shares to the trustees, or such other persons as shall be named by them for that purpose, subject to the charges and incumbrances affecting the same shares respectively, upon trust to sell and convert into money the same, and to hold and apply the proceeds of such sale and conversion, with the powers, upon the trusts, for the purposes, subject to the provisions, and generally in manner hereinbefore declared and mentioned concerning the trust premises hereby assigned, and the proceeds of the sale and conversion thereof, or as near thereto as circumstances will permit; and thereupon the debtor, and every person having or claiming any such estate or interest as aforesaid, shall deliver over all deeds, writings, and things in or under their respective possession, or custody, or control, in anywise relating to the said shares, or any of them; and shall execute and do all such assurances and things, and give all such information and explanation for effectuating the purposes aforesaid, as by the trustees shall be reasonably required.

And meanwhile not to alienate or charge the same.

21. The debtor, his executors or administrators, shall not, without the consent of the trustees, alienate, charge, or incumber the said shares hereby covenanted to be assured, or any of them, or the dividends or income thereof respectively.

V. Declaration of Trusts of Proceeds of Sale for Benefit of Creditors.

[*Power of attorney as in Precedent I., clause* 6; *release of debtor; provisions saving rights of secured creditors, and as to avoidance of release in case of concealment by debtor; trustees' indemnity clause; power to appoint new trustees; proviso for avoidance of deed, as in Precedent II., clauses* 23 *to* 28, *inclusive.*]

In witness, &c.

Schedule of Creditors.

VI. *DEED OF ASSIGNMENT by* Co-partners in Trade *upon Trusts for the benefit of their Creditors, subject to the* supervision *of a* Committee of Inspection (*a*).

THIS INDENTURE, made between [*debtors*], all of ——— Street, in the city of ———, trading in partnership there under the style or firm of ——— Brothers, of the first part; [*trustee*], of &c., and [*trustee*], of &c., of the second part; [*inspector*], of &c., [*inspector*], of &c., and [*inspector*], of &c., of the third part, and the several persons whose names and seals are subscribed and affixed in and to the schedule hereunder written, or who otherwise accede to these presents, being creditors of the said [*debtors*] jointly, or of one or other or both of them separately, or of the said [*debtors*] jointly, and of one or other or both of them separately, of the fourth part: WITNESSETH as follows:— Parties. *Testatum.*

1. In the construction of these presents (unless a contrary intention appears) the expression "the debtors," shall mean the said [*debtors*], and the expression "the trustees," shall mean the said [*trustees*], and the survivor of them, and the executors or administrators of such survivor, and the trustees or trustee for the time being of these presents; and the expression "the committee of inspection," shall mean the parties hereto of the third part, and all other members of the committee of the creditors of the debtors jointly, or of one or other or both of them separately, or of the debtors jointly, and of one or Interpretation clause.

(*a*) As to the liabilities of trustees carrying on the business of a debtor under the provisions of a creditor's deed, in the event of the subsequent bankruptcy of the debtor, see *ante*, p. 494.

VI. Assignment by Partners in Trade for Benefit of Creditors.

other or both of them separately, who shall hereafter be duly appointed in manner hereinafter provided; and the expressions "inspector" and "inspectors" respectively, shall mean a member and members of the committee of inspection; and the expression "the creditors," shall mean the parties hereto of the fourth part, and all other persons who are at the date of these presents creditors of the debtors jointly, or of one or other or both of them separately, or of the debtors jointly, and of one or other or both of them separately, and of whom the trustees shall have notice before completing the distribution of the property of the debtors under the trusts and provisions herein contained; and words in the singular number shall mean also the plural; and words in the plural shall mean also the singular; and words denoting males shall mean also females; and words denoting persons shall include corporations, companies, and partnership firms in the United Kingdom and elsewhere.

Assignment of personal estate.

2. The debtors do and each of them doth hereby assign unto the trustees all the joint and respective personal property, credits, and effects of the debtors (save and except out of the assignment hereby effected all such leaseholds and such other parts of the said personal property, credits, and effects (if any), as the committee of inspection or the majority of them shall consider it undesirable to accept, by reason of any onerous rents, covenants, calls, burthens, or other incumbrances or liabilities, either present or future, certain or contingent, relating to or affecting the same; And also save and except the wearing apparel of the debtors respectively, and of their respective families); TOGETHER with the goodwill of the said business of the debtors at ——— aforesaid; To HOLD all and singular the personal estate, credits, and effects, and premises hereby assigned unto the trustees, according to the nature and quality of the same respectively, but subject to the charges or incumbrances now affecting the same premises respectively, upon the trusts and with and subject to the powers and provisoes hereinafter contained concerning the same respectively.

Trust for sale of property assigned.

3. The trustees shall, with all convenient speed, call in, collect, compel payment of, and receive any outstanding parts of the same premises respectively, and sell and convert into money such parts thereof as shall not consist of money, with full power generally to do all such acts and things in regard

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to the premises as to them shall seem proper or expedient in the interests of the creditors.

Trusts of proceeds of sale, &c.

4. The trustees shall, out of the moneys to be realized as aforesaid, and other the moneys (if any) arising from the personal estate of the debtors and each of them respectively, pay all the costs, charges, and expenses of and incident to these presents, and of and attending the realization and conversion into money of the said estates, including such remuneration to the trustees for their services as the committee of inspection or a majority thereof shall think reasonable; and shall distribute the residue of the said moneys unto and among the creditors of the said debtors, and each of them, in like manner as the same would be distributable under a bankruptcy of the debtors founded on an act of bankruptcy committed at the date of the execution of these presents.

Provided always, and it is hereby agreed and declared as follows:—

Power for trustees with sanction of committee to postpone sale.

5. Notwithstanding the trust for sale and conversion hereinbefore contained, it shall be lawful for the trustees, with the consent in writing of the committee of inspection or of a majority thereof, to postpone the sale, conversion and collection of the whole or any part or parts of the said premises hereby assigned, until such time or times or for such period or periods from time to time as the committee of inspection or a majority thereof shall think fit.

Power to manage property till sale.

6. Until the said premises, respectively, shall have been collected or sold and converted into money as aforesaid under the trusts of these presents, the trustees may manage and employ and repair and insure against damage or loss by fire or otherwise all or any part of the same premises respectively, at the cost of the trust estate.

Power with sanction of committee to employ debtors and others.

7. The trustees may, with the consent in writing of the committee of inspection, employ the debtors, or either of them, or any other person or persons, to assist in winding up the said business of the said debtors, including the travelling for and collecting in the outstanding debts and estate, in the United Kingdom or elsewhere, during such period as may be thought necessary or expedient, and to assist in realizing the said property hereinbefore assigned, or otherwise to act in the execution of all or any of the trusts or powers of these presents; and, in case of such employment as aforesaid, may

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pay to the debtors or other persons so employed such allowance, salary, or remuneration for the services so rendered as the committee of inspection or a majority thereof shall direct, and to pay the same out of the trust estate.

Moneys received to be paid in to bank.

All moneys and securities for money which shall come to the hands of the trustees shall, until the same shall be applied or distributed according to the trusts of these presents, be placed, in the names of the trustees, in such bank and to the credit of such account as the committee of inspection or a majority thereof shall direct.

Power for trustees with consent of committee to invest proceeds.

8. The trustees, with the consent of the committee of inspection, or a majority thereof, may invest the moneys which shall come to their hands as aforesaid, in the names of the trustees, in any of the public stocks or funds or Government securities of the United Kingdom or of India, or in the purchase of exchequer bills, until the same shall be required for application or distribution under the trusts of these presents.

Joint and several covenants by debtors.

In consideration of the premises, the debtors do hereby jointly, and each of them, as a separate covenant, doth hereby severally covenant with trustees, and also as separate covenants with all and singular the said persons parties hereto of the fourth part respectively, as follows :—

That their statement of property assigned is correct.

9. So far as relates to the acts, deeds, and defaults of the debtors, and each of them, they and he have and hath given to the said trustees or trustee before the execution of these presents a full statement of the property comprised in these presents whereof they or he can give or order present possession.

To deliver statement of property and liabilities.

10. The debtors and each of them shall, when thereto required by the trustees or the committee of inspection, or a majority of such committee, at all times during the continuance of these presents, deliver a full statement of the premises hereby assigned and of all charges, incumbrances, and equities affecting the same, or any part thereof, so far as they or he shall be able to furnish the same, and also full and complete accounts of all the debts, engagements and liabilities, joint and separate, certain and contingent, present and future, of them and each of them, and all set-off and counterclaims whatsoever affecting the same, together with, so far as is in their power, the names, residences, and occupations of the several creditors and debtors of them and each of them.

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11. The debtors and each of them shall at all times during the continuance of these presents, when required so to do, give their best endeavours and full assistance in or towards realizing the said property hereby assigned, and every part thereof, and converting the same into money and distributing the same among the creditors entitled thereto under the trusts of these presents.

To render assistance in realizing estate.

12. The debtors shall not nor shall any of them at any time hereafter, during the continuance of these presents, either solely or in partnership with or as agents or agent for any other persons or person, directly or indirectly carry on or engage or be concerned or interested in the business of a ——— or in any business connected therewith, nor suffer their or his names or name to be used or employed in carrying on or in any way in connection with any such business as aforesaid in ——— aforesaid or within ——— miles thereof, except only if and so far as the debtors or either of them shall be employed in or about effectuating the purposes of these presents under the provision in that behalf hereinbefore contained.

Not to carry on trade within specified limits.

13. The debtors and each of them, and every person claiming any estate, right, title, or interest in the said premises or any part thereof, through, under, or in trust for them or either of them, shall at all times hereafter at the request of the trustees, but at the expense of the trust estate, execute and do all such assurances and things for the further or more perfectly assuring all or any part of the said premises hereby assigned unto the trustees for better enabling them to obtain possession of and quietly enjoy the same pursuant to the provisions of these presents, and generally to effectuate the purposes of these presents and to carry into effect acts done under the authority thereof as by the trustees shall be reasonably required.

For further assurance.

Covenants by creditors.

And each of them the said persons, parties hereto of the fourth part, so far as relates to his now acts, deeds, and defaults, but not further or otherwise, hereby covenants with the debtors and each of them as follows:

Not to sue.

14. If at any time any creditor shall commence or prosecute any action or other proceeding to recover from the said debtors or either of them, or the heirs, executors, or administrators, or the estate or effects of them or either of them, any debts now due from the debtors or either of them, or provable

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under the trusts of these presents; or make or sue out any attachment or sequestration of or upon them or him, or their or his property, credits, or effects, save as hereinafter provided, then these presents may be pleaded and set up in bar to or to the further prosecution of (as the case may require) any and every such action or other proceeding, and in full discharge of every or any such attachment or sequestration: Provided always, that every action brought for the sole purpose of foreclosing or realizing any mortgage, lien, charge, or other specific security which could not be conveniently realized without such action, and every action to which the debtors or either of them are, is, or may be a necessary party, and which shall be brought or prosecuted for the sole purpose of making any such security as aforesaid available otherwise than against the debtors or their property or the premises hereby assured; and every action which shall be brought for the sole purpose of establishing a disputed right, or for liquidating a disputed demand against the debtors or either of them, and every proceeding which may be taken solely for the purpose of enforcing the due execution of the trusts of these presents, shall, so long as the same actions or proceedings respectively shall be confined to the said purposes respectively, and shall not be used or attempted to be used for the purpose of obtaining payment from the debtors or either of them, or the heirs, executors, or administrators, or the estates or effects of them or either of them, otherwise than under the trusts of these presents, shall be deemed and taken not to be within the meaning of the covenant lastly hereinbefore contained, and may, notwithstanding the same covenant, be prosecuted, but so far only as may be necessary for the purposes hereinbefore respectively mentioned, and to any further prosecution thereof, these presents may be pleaded or set up in bar.

PROVIDED ALWAYS, and it is hereby agreed, as follows:—

Saving rights of secured creditors.

15. Notwithstanding anything herein contained, such of the creditors of the debtors or either of them as hold security for their debts respectively as shall execute and assent to these presents shall not thereby in anywise prejudice or affect their securities, all the powers and provisions whereof are hereby expressly reserved, as are also their rights against sureties and any other parties in respect of the said debts.

As to proof of debts.

16. Every creditor shall from time to time, before being entitled to any dividend under and by virtue of these presents,

if required by the trustees, deliver to them a statement in writing signed by him of his debt or claim, with all the particulars usual on a proof in bankruptcy, comprising any satisfaction and security he may have received, or may hold for the same, and shall, if required as aforesaid, produce all such receipts, vouchers, matters and things, as shall or may affect his debt or claim, and as would be required in a Court of Bankruptcy if the estate of the debtors were administered therein.

Avoidance of arrangement (except as to things already done thereunder) in case of default by debtors or either of them, &c.

17. If the trustees shall at any time certify in writing under their hands either first that there has been wilful default in the performance or observance of any of the agreements or covenants herein contained, on the part of the debtors or either of them, or that the debtors, or either of them, have retained or refused to account for any sum or sums of money received by them or either of them, or secondly that in the judgment of the said trustees or trustee a sufficient proportion in number and value of the said creditors have not executed in writing, assented to, or approved of these presents (*b*), then, but in the first of such cases, so far only as regards the debtor with reference to whom such certificate shall have been made, and his separate creditors, and, in the second of such cases, as regards both the debtors and all the creditors, these presents and everything herein contained shall (except as to anything actually theretofore done in pursuance hereof, and without prejudice to any right of action theretofore accrued hereunder), cease and be void, and all persons, except as aforesaid, shall be remitted to such rights and securities as they would respectively have had if these presents had not been executed.

Power for committee of inspection to appoint new trustees.

18. If any one or more of the trustees shall die, or depart from England with the intention of residing elsewhere, or shall remain out of England for more than ——— calendar months [at any one time, or for more than ——— calendar months in the aggregate in any one year (*c*)], or shall desire

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(*b*) If the assent of all the creditors cannot be obtained, a clause should be inserted in this deed empowering the trustees "with the consent of the committee of inspection" to pay in full or arrange with non-assenting creditors. See *ante*, p. 499.

(*c*) The words in brackets may be inserted where the amount of property to be administered, and complication of accounts or other circumstances, render it likely that the administration will be prolonged.

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to be discharged, or refuse, or become incapable or unfit to act, or if at any time it shall appear expedient to appoint an additional trustee or trustees, then and in every such case it shall be lawful for the committee of inspection, or the majority of them, by deed to appoint new or additional trustees or trustee (as the case may be), in the place of the trustee or trustees so dying, or departing or remaining out of England, or desiring to be discharged, or refusing, or becoming incapable or unfit to act as aforesaid, or in addition to the existing trustees or trustee, as the case may be: And upon every such appointment the trust estate shall (if and so far as the nature thereof, and other circumstances, shall require or allow) be assured (*d*), so that the same may effectually vest in the trustees or trustee for the time being of these presents (*e*).

(*d*) This assurance may, if desired, and the nature of the property allow, be effected by a vesting declaration contained in the deed appointing the new trustee. See sect. 34 of the Conveyancing Act, 1881, stated *ante*, p. 7, tit. APPOINTMENT OF NEW TRUSTEES.

Meetings of creditors.

(*e*) The following clause may be inserted if desired, but its insertion is not generally to be recommended. Such meetings of the creditors are expensive and troublesome, and ought to be unnecessary if the members of the committee are capable men enjoying the confidence of the creditors.

Power for committee of inspection to summon meetings of creditors.

18A. It shall be lawful for the committee of inspection, from time to time, by a circular letter addressed to all the joint and respective separate creditors of the debtors for the time being entitled to the benefit of these presents, whose respective places of abode, or of business, shall be known to the committee, and sent through the post to, or left for the said creditors so entitled as aforesaid at their respective last-known places of abode or business, seven days at the least before the day in the said circular letter appointed for the purpose, to convene a general meeting of the joint and respective separate creditors of the debtors, to be held at some place within ——— miles from ———, and on such day and at such time, to be specified respectively in the said circular letter, as the committee of inspection shall think fit; and at such meeting to submit anything wherein they shall require the direction, advice, and concurrence of the creditors, and to vote thereon; and the resolutions then agreed to by the majority in value of the joint and respective separate creditors of the debtors then present, by themselves or their agents (such resolutions

Power for creditors to remove trustees.

19. It shall be lawful for the creditors present or represented by proxy, at a general meeting of the creditors convened for the purpose by the committee of inspection, or the majority of them, or by any creditors whose debts collectively amount to the sum of £——— by a circular letter stating the time, place and object of such meeting, and addressed and sent by post or otherwise to all the creditors for the time being entitled to the benefit of these presents, at their respective last-known places of abode, or business, seven days at the least before the day by such circular letter appointed for the said meeting, by a resolution passed by a majority [in number and three-fourths] in value of the creditors present or represented by proxy at the said meeting and voting on the resolution, to remove the trustees, or any one or more of them, for any cause which may seem to such majority sufficient, and by a like resolution passed at such meeting, or an adjournment thereof, to appoint a new trustee or trustees in the place of the trustee or trustees so removed as aforesaid: And upon every such appointment, &c. [*ut supra*].

Power for creditors to appoint new inspectors.

20. If any one or more of the inspectors shall die or depart from England with the intention of residing elsewhere, or shall remain out of England more than ——— calendar months [at any one time, or for more than ——— months in the aggregate in any one year (*f*)], or shall desire to be discharged, or refuse, or become incapable or unfit to act, then and in every such case the surviving or other members or member of the committee of inspection shall forthwith convene a general meeting of the creditors in manner hereinbefore provided, and it shall be lawful for the creditors, by a resolution passed by a majority [in number and three-fourths] in value of the creditors present or represented by proxy at the meeting so convened, and voting on the resolution, to appoint a new member or members (whether or not being a creditor or

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being in accordance with the course which would have been pursued under like circumstances, under an administration of the trust estate, as the joint and respective separate estates of the debtors in bankruptcy), shall be obligatory upon all the joint and respective separate creditors of the debtors who shall have in writing assented to, or approved of, these presents.

(*f*) As to these words in brackets, see *ante*, p. 517.

VI. Assignment by Partners in Trade for Benefit of Creditors.

creditors of the debtors or either of them), in the place of the inspector or inspectors so dying, or departing, or remaining out of England, or desiring to be discharged, or becoming incapable or unfit to act as aforesaid: And upon every such appointment the number of the inspectors may be augmented or reduced: And every inspector so appointed may act and assist in the execution of the powers and provisions of these presents as fully and effectually as if he had been hereby constituted an inspector (*e*).

In Witness, &c.

Schedule of Creditors.

VII. *AGREEMENT for Composition by Debtors Trading in Co-partnership* (*f*).

AN AGREEMENT made this ——— day of ———, 18—, between [debtors], all of ———, in the city of London, builders (who are hereinafter called the debtors, and the agreements on whose parts are expressly to be taken as joint and several agreements), of the one part, and their joint creditors of the other part: Whereby it is agreed as follows, that is to say:

Parties.

Agreement.

Payment of composition by instalments.

1. The debtors shall pay, and the creditors shall accept in discharge of their respective debts, twenty shillings in the

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(*e*) Another form, giving the power of appointing new inspectors to the surviving or continuing inspector or inspectors, will be found in the Precedent of a Deed of Inspectorship, No. XII., *post*, p. 537, followed by clauses providing for indemnifying the inspectors, and limiting their liability in respect of moneys received, &c., and for reimbursing them for expenses incurred. In the case contemplated in the above precedent, the functions of the inspectors are mainly those of supervision, and these clauses do not seem to be required.

(*f*) Compositions, like other arrangements with creditors, are generally effected by deed. Generally speaking, a creditor cannot bind himself by a contract not under seal to accept a *part* of an ascertained debt in satisfaction of the whole amount due; but if a new consideration is introduced, such as payment at an earlier time than when the debt becomes due, or the agreement by the creditors with one another to accept less than the amount due to them respectively in discharge of the whole, the transaction will be valid, although not under seal: see *Beer* v. *Foakes*, 11 Q. B. D. 221; and see *Cumber* v. *Wane*, 1 Strange, 426; *S. C.*, 1 Sm. L. C. 357, in the notes to which case the cases on this point are collected.

VII. Agreement for Composition by Partners.

pound on the amount of such debts by four instalments to be secured by the joint and several promissory notes of the debtors as follows:

5*s.* in the £ on the 1st of May, 18—.
5*s.* in the £ on the 1st of August, 18—.
5*s.* in the £ on the 1st of November, 18—.
5*s.* in the £ on the 1st of February, 18—.

Last two instalments to bear interest.

2. The last two of such instalments shall bear interest at the rate of 5*l.* per centum per annum from the 1st of April, 18—, payable by the debtors, if Messrs. B. & Co., of ——— Street, in the city of London aforesaid, accountants, certify in writing that in their opinion the joint and surplus separate estates of the debtors are sufficient for that purpose.

Separate estates of debtors to be assured to trustees for realization.

3. The debtors shall forthwith assure their respective separate estates to A. B., of the said firm of B. & Co., and C. D., of ——— Street, in the city of London aforesaid, solicitor, or to such person or persons as they shall direct, upon trusts for realization.

Trusts of proceeds of realization.

4. The proceeds of such realization shall be applied in or towards satisfaction of the respective separate debts of the debtors, and the surplus (if any) after paying or providing for the expenses of and incident to this agreement shall be applied to the payment of the instalments hereinbefore mentioned.

Conduct of debtors' business.

5. Until the instalments shall have been paid the debtors shall carry on and wind up their joint affairs under the supervision in every respect of Messrs. B. & Co.

Cesser of agreement on default, &c.

6. If default shall be made in payment of any one of the instalments, or if Messrs. B. & Co. shall at any time certify in writing that in their opinion it is advisable in the interests of the creditors that this agreement shall determine, or if any receiving order shall be made on a bankruptcy petition presented by the debtors or either of them, or by any other person, the whole of the respective instalments then remaining unpaid shall thereupon immediately become payable (*g*).

(*g*) Except where a composition deed contains an absolute release of the original debt (as to which, see *ante*, p. 501, and *post*, p. 525), it has long been an established rule in equity, that where a creditor agrees to take less than his debt, provided it be paid at a fixed time, and the debtor fails in payment, he cannot be relieved, and the whole of the original debt will revive: *Ex parte Rennet*, 2 Atk. 527; *Garrod* v. *Simpson*, 3 H. & C. 395; but the creditor must deduct the amount (if any) which he has actually received under the composition: *Ex parte Vere*, 19 Ves. 93; *Ex parte*

VII. Agreement for Composition by Partners.

7. The creditors shall not, until the happening of one of the events mentioned in the last clause hereof, sue or take any proceedings against the debtors or either of them or their estates or effects in respect of any debt or demand now owing.

Creditors not to sue till default, &c.

8. This agreement shall not prejudice or affect any security or claim on any third persons which any of the creditors may have or claim for his debt.

Saving rights of secured creditors.

IN WITNESS, &c.

[*Signatures of debtors and of assenting creditors.*]

VIII. *DEED OF COMPOSITION between a Debtor with his Creditors—Creditors who are Private Friends of the Debtor* POSTPONE *their* CLAIMS—*Debtor to deliver Promissory Notes and* DEPOSIT 20*l. weekly to meet* INSTALMENTS *of* COMPOSITION—*On* DEFAULT *of Payment of any Instalment the* WHOLE COMPOSITION *to become* PAYABLE—*Clause as to* RECEIVER *of Debts.*

THIS INDENTURE, made the ——— day of ———, 18—, BETWEEN [*debtor*], of ———, in the county of ———, ironmonger, of the first part [*trustee*], of &c., of the second part, and the several persons, being creditors of the debtor, whose names and seals are subscribed and affixed in and to the first schedule hereunder written or otherwise made to these presents, of the third part, and the several persons, being creditors of the debtor, whose names and seals are subscribed and affixed in and to the second schedule hereunder written, of the fourth part, WITNESSETH as follows:

Parties.

Testatum.

Interpretation clause.

1. [*Interpretation clause ut ante*, p. 496, *except that* "trustee" *will be defined as follows*, "and the expression 'the trustee' shall

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Powell, 1 Dea. 378. Where a creditor agrees to accept a composition and release the debtor, but the debt is never actually released, a subsequent promise of the debtor, express or implied, will revive the original debt: *Ex parte Crosley*, 1 Dea. 107. But the right to claim the whole debt is subject to the jurisdiction of the Court to restrain the creditor from doing so, upon equitable grounds, according to all the circumstances of the case: per *Bacon*, C. J., in *Ex parte King, Re Harper*, L. R., 17 Eq. at p. 339. See also *Edwards* v. *Coombe*, L. R., 7 C. P. 519; *Slater* v. *Jones*, L. R., 8 Ex. 186; *Pike* v. *Dickenson*, L. R., 7 Ch. A. 61; *Ex parte Peacock, Re Duffield*, L. R., 8 Ch. A. 682.

VIII. Composition Deed: some Creditors postponing Claims.

mean and include the said [*trustee*] and his executors and administrators, and other the trustee or trustees for the time being of these presents;" *and* "creditors" *will be defined as including* "parties hereto of the third and fourth parts respectively, and all other," &c.]

Covenants by debtor with creditors generally.

In consideration of the release and stipulations hereinafter contained, the debtor hereby covenants with the trustee, and also, and as separate covenants with each of the creditors, as follows:

To deliver accounts of liabilities and property.

2. The debtor shall, with all convenient speed, make, sign, and deliver to the trustee, to his satisfaction, full accounts of all his debts, engagements, and liabilities, together with the names, residences, and occupations of all his creditors, and shall, if required by the trustee, verify the accounts so to be made by him as aforesaid by statutory declaration or other reasonable and sufficient evidence.

To pay costs, &c.

3. The debtor shall, upon the demand of the trustee, pay all costs and expenses incurred or to be incurred in or relating to the negotiation of the arrangement hereby entered into, and the investigation and adjustment of his accounts and transactions, including the costs of and incident to the preparation and execution of these presents, and the carrying the same into effect.

Covenants by debtor with ordinary creditors.

And the debtor hereby covenants with the trustee, and also as a separate covenant with each of the creditors parties hereto of the third part, as follows:

To pay composition dividend by instalments.

4. The debtor shall pay to each of the creditors parties hereto of the third part, such sum of money or composition dividend as shall be equal to the amount of ——— shillings in the pound upon the whole debt of such creditors respectively, by six equal instalments, payable respectively at 2, 4, 6, 8, 10, and 12 calendar months from the ——— day of ———, 18—.

To make and deliver promissory notes to secure composition.

5. The debtor shall, in respect of every such debt as aforesaid, and as a security for the several instalments of the composition hereinbefore covenanted to be paid thereon respectively, forthwith make and deliver to the trustee, in trust to be by him delivered to the creditors respectively entitled thereto, the promissory notes of the debtor made payable to or to the order of such respective creditors parties hereto of the third part, and in sets of six notes, and each set shall correspond respectively in point of amount and time of payment to, and shall secure the several instalments respectively

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for such sum as shall amount in the aggregate to the sum of ——— shillings in the pound.

Covenant by debtor with private creditors.

And the debtor hereby covenants with the trustee, and, as a separate covenant, with each of the creditors parties hereto of the fourth part, as follows:—

6. The debtor shall pay to each of the creditors parties hereto of the fourth part, such sum of money or composition dividend as shall be equal to the amount of ——— shillings upon the whole debt of such creditors respectively, the whole of such sum or composition dividend to be payable to them respectively on demand at any time after the expiration of 12 calendar months after the ——— day of ——— aforesaid.

And it is hereby agreed and declared as follows:

As to bills of exchange.

7. [*Assenting creditors not to negotiate bills of exchange without endorsing memorandum of assent, ut ante*, p. 498.]

As to proof of debts.

8. [*Debts and claims to be provable as in bankruptcy, ut ante*, p. 498.]

As to valuation of debts.

9. [*Valuations of debts may be made by actuary to be appointed by trustee, ut ante*, p. 499.]

Debtor to deposit a weekly sum to cover instalments.

10. During the continuance of the arrangement hereby entered into, and until the said several instalments hereinbefore covenanted to be paid shall have been fully paid, the debtor shall deposit the sum of 20*l.* on the Monday in every week at the ——— bank, or with such other bankers, and in the name of the trustee or otherwise, as the trustee shall direct, the first of such deposits to be made on the Monday next following the execution of these presents by the debtor.

Sums deposited to be applied in satisfaction of instalments.

11. The moneys which, by reason of the deposits under the last clause of these presents, shall from time to time come into the hands of the trustee, or be standing to his credit, or otherwise under his control, shall be taken as moneys paid by the debtor and received by the trustee in or towards the instalments hereinbefore covenanted to be paid by the debtor, and shall be applied by the trustee in or towards payment and satisfaction of such instalments accordingly in the following order, that is to say:—First, in or towards payment of the costs, charges, and expenses in the 3rd clause of these presents covenanted to be paid; and, secondly, in or towards payment of the said composition dividend in the 4th and 6th clauses hereof covenanted or agreed to be paid, by such instalments as are therein respectively mentioned or referred to, and the

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surplus (if any) shall be retained by the trustee as part of the estate of the debtor, for the general purposes of the arrangement hereby entered into, and, subject thereto, shall be held in trust for the debtor.

Acceptance of composition.

12. And in consideration of the payment of the said composition dividend to the creditors, parties hereto of the third part, at the times hereinbefore mentioned, it is hereby agreed and declared (subject nevertheless to the agreements and declarations hereinafter contained (*a*)) that the said composition dividend shall be accepted by them respectively in full satisfaction of their several and respective debts and demands against the debtor.

Covenants by private creditors.

And each of the creditors, parties hereto of the fourth part, so far as relates only to the acts and defaults of himself and his executors and administrators, hereby covenants with the debtor, and also and as a separate covenant with the trustee, and also and as separate covenants with each of the creditors, parties hereto of the third part, as follows:—

To postpone claims.

13. The creditors, parties hereto of the fourth part, shall not until the expiration of twelve calendar months after the ——— day of ——— aforesaid, so long as the debtor shall perform and observe the covenants and agreements on his part herein contained, or until the trustee shall certify in writing that the debtor has failed to perform or observe the same or any of them, bring or institute any action or other proceedings against the debtor for the recovery of their respective debts or any part thereof respectively, nor receive nor attempt to obtain payment of the said debts or any part thereof from the debtor by way of composition or otherwise, or demand or take any security for the said debts or any part thereof.

Provided always, and it is hereby agreed and declared as follows:—

Unpaid instalments to become due on

14. If default shall be made in payment to any one of the creditors, parties hereto of the third part, of any of the in-

(*a*) If a composition deed contains an absolute release of the debtor all right of action in respect of the original debt will be barred; *Small* v. *Marwood*, 9 B. & C. 309; and the creditors, in case of the subsequent bankruptcy of the debtor, will be entitled to prove only for the amount of the composition dividend: Robs. Bank. 271. But where the release is made conditionally on due payment of the composition, nonpayment of the composition will avoid the release: *Newington* v. *Levy*, L. R., 5 C. P. 607.

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stalments of the composition dividend hereinbefore covenanted to be paid to such creditors respectively, or of any part or parts of such instalments respectively at the respective times and in manner hereinbefore provided in those behalves, Or if any of the creditors, parties hereto of the fourth part, shall before the expiration of twelve calendar months after the ——— day of ——— aforesaid, bring or institute any action or proceedings against the debtor for recovery of his debt or any part thereof, then, in the first event, the instalment in respect of which default shall be made in payment thereof to any one of the creditors, parties hereto of the third part, as aforesaid, and all other the instalments of the composition dividend then remaining unpaid, shall, as regards not only the individual creditor, party hereto of the third part, in whose case such default shall be made as aforesaid, but also as regards all the creditors, parties hereto of the third part, respectively, be deemed to be and be payable by the debtor on the day when such default shall be made, and in any other such event as aforesaid, all instalments of the composition dividend on the commencement of such action or proceeding as aforesaid remaining unpaid, shall, as regards all the parties hereto of the third part, be deemed to be and be payable by the debtor on the day on which such action or proceeding shall be commenced, but creditors seeking payment of the said instalments, or any of them, prior to the times hereinbefore provided for payment thereof respectively, and as a condition precedent to such prepayment, shall deliver up to the person or persons paying the same respectively the said promissory note or notes hereinbefore mentioned or referred to, and which are to be given as aforesaid to secure such respective instalments.

default of payment.

If instalments are duly paid creditors to execute release to debtor.

15. If the costs and expenses, by the third clause hereof covenanted to be paid, and also the said composition dividends in the 4th and 6th clauses hereof mentioned or referred to respectively, shall be duly paid at the times and in manner hereinbefore provided for payment thereof respectively, then the creditors, parties hereto of the third and fourth parts respectively, or their respective executors or administrators, shall upon the request, and at the cost of the debtor, his executors or administrators, execute to him or to them a full and sufficient release of the now existing debts of the said creditors respectively, and of all actions, claims, demands, and proceedings for, on account, or in respect of the same or any part thereof. And in the meantime, and

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until default shall be made in any such payment as aforesaid, these presents may be pleaded and used in bar of and as a defence or answer to any and every action or proceeding which has heretofore been, or may hereafter be, commenced or prosecuted by any of the creditors, parties hereto of the third and fourth parts respectively, or by any other person or persons claiming under or through such creditor against the debtor for or on account, or in respect of any debt, claim, or demand provable under these presents.

Saving of rights of secured creditors.

16. Nothing herein contained shall prejudice any security of any creditor, but secured creditors shall be entitled to receive the said composition dividends respectively, upon the same terms as those upon which they would have been entitled to prove in bankruptcy: And every creditor [*continue ut ante*, p. 502].

17. [*Power to appoint a new trustee, ut ante*, p. 503.]

Avoidance of composition and revivor of debts on default of debtor, &c.

18. If during the continuance of this present arrangement the debtor shall enter into partnership with any other person or persons, or make any composition or arrangement with his creditors, or any of them, other than this arrangement, or any assignment for the benefit of them, or any of them, or execute any bill of sale, or if any bankruptcy petition shall be presented against him by himself, or by any present or future creditor, or if he shall commit any act of bankruptcy, or if the trustee shall certify [*ut ante*, p. 502], then and in any of such cases these presents, and everything therein contained, shall be void and of none effect (except only as regards anything already done hereunder), and all the debts of the creditors, parties hereto of the third and fourth parts respectively, shall respectively remain and become payable in full with the deduction only therefrom respectively of the sum or sums (if any) theretofore received under these presents, or from sources other than the estate or effects of the debtor in respect of such debts respectively.

In Witness, &c.

The First Schedule above referred to.

[*Names, addresses, and descriptions of ordinary creditors, with amount of the debt due to each set opposite his name.*]

The Second Schedule above referred to.

[*Names, addresses, and descriptions of creditors who postpone their claims, with amount of the debt due to each set opposite his name.*]

IX. *DEED OF COMPOSITION between* Partners *in Trade and their* Joint Creditors. Sureties *join to guarantee Payment of part of the Composition.*

Parties.

THIS INDENTURE, made the ——— day of ———, 18—, between [*debtor*] and [*debtor*], both of No. —, in ——— Street, in the city of London, carrying on there the business of warehousemen, in partnership, under the style or firm of ——— & Co. (who are hereinafter called the debtors), of the first part; A. B., of &c., C. D., of &c., and E. F., of &c. (who are hereinafter called the sureties), of the second part; [*trustee*], of &c., who is hereinafter, together with his executors and administrators, and the trustee or trustees for the time being of these presents, called and included under the expression "the trustee," of the third part; And all the persons being joint creditors of the debtors, whose names and seals are subscribed and affixed in and to the schedule hereunder written, or who otherwise accede to these presents (who are hereinafter called the creditors), of the fourth part:

Testatum. WITNESSETH as follows:—

Covenants by debtors and sureties.

In consideration of the agreements hereinafter contained the debtors do, and each of them doth, hereby jointly and severally covenant, and also each of the sureties doth hereby covenant (but as to the sureties only as relates to their respective acts, deeds and defaults, and to the payment of the following proportions of the third instalment hereinafter mentioned, that is to say: As to the said A. B. the sum of 100*l.*, and as to the said C. D. the sum of 100*l.*, and as to the said E. F. such a sum as shall be equal in amount to the residue of the said third instalment), with the trustee, and also as separate covenants with each of the creditors as follows:—

That debtors will make and deliver accounts of their assets and liabilities.

1. The debtors shall with all convenient speed make, sign, and deliver to the trustee, to his satisfaction, full accounts of all the joint debts, engagements, and liabilities of the debtors, together with the names, residences, and occupations of their joint creditors, and shall, if required by the trustee, verify the accounts to be so made by them as aforesaid by statutory declaration, or other sufficient evidence.

IX. Composition Deed with Sureties.

2. The debtors shall forthwith, after the execution by them of these presents pay in full all debts of the firm which would be payable in priority to other debts thereof in the distribution of the property of the debtors in bankruptcy.

That debtors will pay preferential debts,

3. The debtors or one of them, or their or his executors or administrators, shall, upon the demand of the trustee, pay [*costs and expenses, ut ante*, p. 523].

and costs.

For payment of composition by instalments.

4. Such a sum of money or composition dividend as shall be equal to the amount of ——— shillings in the pound upon the whole debt of each of the creditors shall be paid to each such creditor by three instalments, being of the amounts and payable at the times hereinafter respectively mentioned (that is to say), the first instalment being one of ——— shillings in the pound, and payable at four calendar months from the ——— day of ——— 18—; the second instalment being one of ——— shillings in the pound, and payable at eight calendar months from the ——— day of ——— aforesaid, and the third instalment being one of ——— shillings in the pound, and payable at twelve calendar months from the ——— day of ——— aforesaid, and as to the first and second of the said instalments by the debtors or one of them, their or his executors or administrators. And as to the third of the said instalments by the debtors and their sureties or some or one of them, or their or his executors or administrators (the liability of the sureties respectively being limited in manner hereinbefore appearing).

That debtors will make and deliver promissory notes.

5. The debtors shall, in respect of every debt so covenanted to be paid as aforesaid, and as a security, &c. [*covenant to deliver promissory notes* in sets of four," *ut ante*, p. 523.]

And it is hereby agreed and declared.

As to bills of exchange.

6. [*Assenting creditors not to negotiate bills of exchange without endorsing memorandum of assent, ut ante*, p. 498.]

As to proof of debts.

7. [*Debts and claims to be proveable as in bankruptcy, ut ante*, p. 498.]

As to valuation of debts.

8. [*Valuation of debts may be made by actuary to be appointed by trustee, ut ante*, p. 498.]

As regards creditors sureties to be principals.

9. Although as between the debtors and the sureties respectively the sureties are only sureties for the debtors, yet as regards the creditors the sureties are to be taken to be principal debtors so that the sureties and each of them,

IX. Composition Deed with Sureties.

their and his heirs, executors or administrators, shall not be released or exonerated by time being given to the debtors or by any other dealing between the creditors or any of them, their or his heirs, executors or administrators, partners or assigns, and the debtors, or either of them, their or his executors or administrators, or by any act or omission by the said creditors, or any of them, or their or his heirs, executors, or administrators, partners or assigns, or by any other act, deed or thing whatsoever whereby the sureties, their heirs, executors or administrators, as sureties only for the debtors, would be so released or exonerated.

Appropriation of a sum of money deposited in bank by debtors.

10. The sum of 200*l.*, which has, on the part of the debtors, been deposited in the ——— Bank in the name and to the account of the trustee and now in his hands (as he hereby doth acknowledge) shall be taken as money paid by the debtors and received in or towards the composition dividend hereinbefore covenanted to be paid, and shall be applied by the trustee accordingly in manner hereinafter appearing, that is to say: First, in or towards payment of the costs, charges, and expenses in the third clause hereof covenanted to be paid; and, secondly, in or towards payment of the third and last instalment of the composition dividend hereinbefore covenanted to be paid. And the surplus (if any) of the said sum of 200*l.*, and of any accretion thereto by way of interest or otherwise, shall, subject to any claim which the trustee may have for the general purposes of the arrangement hereby entered into, and to the payment of such claim thereout, be paid by the trustee to the debtors according to their respective rights and obligations as between themselves.

Agreement to accept composition and not to sue.

11. And in consideration of the payment of the said composition dividend to the creditors at the times hereinbefore mentioned IT IS HEREBY AGREED and declared (subject, nevertheless, to the agreements and declarations hereinafter contained): First, that the said composition shall be accepted by the creditors respectively in full satisfaction of their several and respective claims and demands against the debtors or either of them for or in respect of all joint debts of the debtors; AND, secondly, that unless and until failure shall be made in payment of the said debts by the second clause hereof covenanted to be paid in full, or in payment of the costs and expenses by the third clause hereof, covenanted to be paid, or in payment of the said composition dividend or some part

thereof at the times hereinbefore mentioned in that behalf, these presents may be pleaded and used in bar of or as a defence or answer to any and every action or proceeding which has been heretofore or may be hereafter commenced or prosecuted by any of the creditors, or by any other person or persons claiming under or through such creditor, against the debtors or either of them for or on account or in respect of any debt, claim, or demand provable under these presents.

Provided always, and it is hereby agreed and declared as follows:—

Saving of rights of secured creditors.

12. Nothing herein contained shall prejudice any security of any joint creditor of the debtors, but secured joint creditors shall be entitled to receive the said composition dividend upon the same terms as those upon which they would have been entitled to prove in bankruptcy, and the creditors shall retain all their respective rights and remedies against any persons other than the debtors as if these presents had never been executed: And for the sake of conformity only the debtors, or either of them, or their or his heirs, executors or administrators, may be joined in any action or other proceedings to be brought or instituted by any of the creditors against any such other person.

Avoidance of deed.

13. If default shall be made in payment of any of the instalments hereinbefore covenanted to be paid, or any part thereof respectively, at the respective times and in manner hereinbefore provided, or, if during the continuance of this present arrangement, the debtors shall dissolve partnership, or take into partnership with them any other persons or person, or if the debtors or either of them shall make or enter into any composition or arrangement with their or his creditors other than this arrangement, or any assignment for the benefit of such creditors, or any of them, or execute any bill of sale, or if any bankruptcy petition shall be presented against the debtors, or either of them, by themselves or himself, or by any present or future joint or separate creditor or creditors, or if the debtors, or either of them, shall commit any act of bankruptcy, then, and in any of such cases, these presents and everything herein contained shall be void and of none effect (except only as regards anything already done hereunder), and all the debts of the creditors, parties hereto, shall respectively revive and become payable in full

IX. Composition Deed with Sureties.

with the deduction only therefrom respectively of the sum or sums (if any) theretofore received under these presents, or from sources other than the estate or effects of the debtors in respect of such debts respectively.

14. [*Power to appoint new trustees, ut ante*, p. 502.]

In witness, &c.

Schedule of Creditors.

X. *DEED OF COMPOSITION and* Arrangement *between a* Married Woman *and her* Creditors. Debtor *to pay* Annuity *of* 500*l. as* Sinking Fund *for* Payment *of* Debts *in full, and of* Interest *at* 5*l. per cent.* Moneys *renewed to be* applied *and* administered *as in* Bankruptcy. Release *of* Debtor *and her* Husband.

Parties.

THIS INDENTURE, made the ——— day of ———, 18—, Between [*debtor*], the wife of [*husband*], of ———, in the county of ———, Esquire, of the first part; [*trustee*], of &c., and [*trustee*], of &c., of the second part; the creditors of the said [*debtor*], whose names and seals are subscribed and affixed in and to the schedule hereunder written, or who otherwise accede to these presents, of the third part, and the said [*debtor's husband*], of the fourth part: WITNESSETH as follows:—

Testatum.

Interpretation clause.

1. [*Interpretation clause, ut ante*, p. 496.]

Covenants by debtor.

In consideration of the release hereinafter contained the debtor hereby, with the intent to bind her separate estate, covenants with the trustees, and also as a separate covenant with each of her creditors, as follows:—

Debtor to pay costs, &c.

2. The debtor shall pay all costs [*continue ut ante*, p. 523].

Debtor to pay annuity of 500*l.* as sinking fund to pay debts and interest at 5 per cent.

3. The debtor, her executors or administrators, shall, until under the trusts hereinafter declared of or concerning the moneys hereby covenanted to be paid, the creditors of the debtor shall have received payment in full of all their demands, with interest as hereinafter provided, pay to the trustees an annuity or clear yearly sum of 500*l.*, to commence from the

X. Composition Deed by Married Woman providing for Sinking Fund.

day of the date of these presents, to be charged upon the separate estate of the debtor, subject to all prior charges or incumbrances now affecting the same estate, and to be paid by equal quarterly payments on the ——— day of ———, the ——— day of ———, the ——— day of ———, and the ——— day of ——— in every year, without any deduction, the first of such quarterly payments to be made on the ——— day of ——— next.

PROVIDED ALWAYS, and it is hereby agreed and declared as follows:—

Application of moneys received in respect of annuity.

4. The trustees shall, out of the moneys hereinbefore covenanted to be paid to them, as and when the same shall come into their hands, pay and retain all such of the costs, charges, and expenses mentioned in the second clause of these presents, as shall for the time being remain unpaid, notwithstanding the covenant contained in that clause; and shall apply and administer the surplus of the said moneys for the benefit of the creditors of the debtor in like manner as if she had been a *feme sole*, and at the date of these presents had been duly adjudicated bankrupt, except that under such application and administration the rate of interest payable on the claims of creditors shall be 5 per cent. per annum, instead of 4 per cent. per annum as in bankruptcy; and the trustees shall pay the surplus (if any) of the moneys which shall come into their hands as aforesaid to the debtor, her executors, administrators, or assigns.

Employment of persons to execute trusts.

5. The trustees may, if they think fit, employ any person, &c. [*ut ante*, p. 498].

6. The trustees may deposit [*ut ante*, p. 498].

Deposit of moneys in bank.

Investment of moneys received.

7. The trustees may, instead of depositing the said moneys as hereinbefore provided, invest the same or any part thereof in their names in government securities of the United Kingdom, or in the purchase of exchequer bills, but not in any other investment, until the moneys so invested can be applied pursuant to the provisions hereinbefore mentioned.

Further *testatum*.

AND THIS INDENTURE FURTHER WITNESSETH, in consideration of the premises, as follows:—

Release of debtor and her husband.

8. Each of the creditors hereby releases the debtor, her heirs, executors, or administrators, and her and their estates

X. Composition Deed by Married Woman providing for Sinking Fund.

and effects; and also the said [*debtor's husband*], his heirs, executors, or administrators, and his or their estates and effects, from all debts, sums of money, amounts, actions, claims and demands, for the payment and satisfaction of which provision is made by these presents.

PROVIDED ALWAYS, and it is hereby agreed and declared as follows:—

Saving rights of secured creditors, &c.

9. Nothing herein contained shall discharge or prejudice any mortgage, lien, or security on any property or effects of the debtor or any other person; and the creditors of the debtor shall retain all their rights and remedies in respect of debts, sums of money, accounts, actions, claims, and demands for the payment and satisfaction of which provision is made by these presents against any persons other than the debtor and the said [*debtor's husband*] as if these presents had never been executed; and for the sake of conformity alone the debtor and the said [*debtor's husband*], their, her, or his heirs, executors or administrators, may be joined in any actions or other proceedings to be brought or instituted by any creditor against such other persons.

Appointment of new trustees.

10. [*Insert power of appointing new trustees, ut ante*, p. 503.]

IN WITNESS, &c.

SCHEDULE OF CREDITORS.

XI. *LETTER OF LICENCE conditioned on payment by the Debtor of a Composition of Twenty Shillings in the Pound by Instalments.*

Grant of licence to debtor to conduct business and affairs.

KNOW ALL MEN BY THESE PRESENTS, that we whose names and seals are hereunto subscribed and affixed, being respectively creditors either in our own right or in copartnership of [*debtor*], of ——— in the county of ———, draper (hereinafter called the debtor), for divers good considerations, for ourselves respectively and our respective partners, and our several and respective heirs, executors, and

administrators, but not any one of us for the other or others of us, or his or their partners, heirs, executors, or administrators, or the acts or deeds of the other or others of us, do, and each of us doth hereby, but so far only as may or can be done without releasing or prejudicing any securities which we respectively now hold, or may hereafter hold, upon or against property of the debtor or others, or our respective rights or remedies against persons other than the debtor, and upon condition of and until the avoidance of these presents under the proviso in that behalf hereinafter contained, give and grant to the debtor full, free, and absolute liberty and licence henceforth to conduct and manage all and every his trade or business of a draper aforesaid, and other his affairs and concerns, and to collect, get in, realise, sell, and dispose of all and every or any part of the stock in trade, real and personal estates, credits, effects, and assets of the debtor until the ——— day of ——— 18—. AND FURTHER KNOW YE that as far as may or can be done without releasing or prejudicing any securities which we respectively now hold or may hereafter hold upon or against property of the debtor or others, or our respective rights or remedies against persons other than the debtor, and upon condition of and until such avoidance of these presents as aforesaid, we do, and each of us doth hereby, for ourselves respectively, and our respective partners, and our several and respective heirs, executors, and administrators, but not any one of us for the other or others of us, or for his or their partners, heirs, executors, or administrators, or the acts or deeds of any other or others of us, covenant with the debtor that we, or our respective executors or administrators, partner or partners, or any other person or persons, by, with, or through our or any of our order, privity, or procurement, will not at any time hereafter, until the said ——— day of ———, 18—, or until such avoidance of these presents as aforesaid, whichever shall first happen, sue or otherwise proceed, personally or otherwise, against the debtor, his heirs, executors, or administrators, or his or their estates or effects, in respect of our respective debts, claims, or demands, or impede or molest the debtor in the conduct or management of his business or concerns, or in the sale or disposition of his estates and effects, nor seize or possess ourselves of, or in anywise intermeddle with, all or any of the goods, estate, property, effects, or assets whatso-

Covenant by creditors not to sue.

XI. Letter of Licence.

ever of the debtor, or of any part thereof: And in case any of us respectively, or our respective heirs, executors, administrators, partners, or assigns, shall act in anywise in breach of this covenant, then that these presents may be pleaded in any Court as a bar, and in discharge of all and every action, suit, or other proceeding, judgment, and execution which shall or may be brought, commenced, sued, prosecuted, or taken in respect of the matters aforesaid against the debtor, his heirs, executors, administrators, or his or their goods or estates, by us or any of us, our heirs, executors, or administrators, partner or partners, or any other person or persons, by, through, or with our or any of our acts, privity, order, or procurement: Proviso for avoidance of letter of licence on default in—

PROVIDED ALWAYS, and it is hereby expressly agreed and declared, that these presents and everything herein contained shall be void in case default shall be made in the performance and observance, in every respect and by whomsoever, of the following conditions, that is to say:—FIRST, in payment by the debtor of all costs, charges, and expenses to be incurred in or relating to his suspension of payment, and the investigation and adjustment of his accounts and transactions, including the costs of and incident to these presents, and the carrying the same into effect, and the payment of the composition hereinafter mentioned: SECONDLY, in payment by the debtor to each of his creditors of such a sum of money or composition dividend as shall be equal to the amount of twenty shillings in the pound upon the whole debt of such creditors respectively, by three equal instalments, payable respectively at six, nine, and twelve months from the date of these presents, and receivable, in the case of creditors holding mortgages, liens, or securities on any property, credits, or effects of the debtor or of any other person, upon the same terms as those on which they would have been entitled to prove in bankruptcy: AND, THIRDLY, in the deposit by the debtor in the hands of Messrs. ———, of ———, accountants, to be by them distributed, and in the consequent distribution by them amongst the creditors of the debtor in payment of the aforesaid composition, at the times already mentioned, of the following sums at the following times, that is to say, one-third part of the first instalment of the said composition on or before the ——— day of ———, 18— (*i.e., three months before the first instalment is to be payable*), and a like sum on or before the ——— day of every succeed-

(i) Payment of costs.

(ii) Payment of composition of 20*s.* in the pound by instalments.

(iii) In deposit of funds to meet successive instalments.

ing month, until the whole of the said composition dividend shall be fully paid to all the creditors of the debtor. PROVIDED ALWAYS, that such avoidance of these presents as is hereinbefore provided shall not invalidate or affect anything theretofore done in pursuance of these presents, nor prejudice any right of action theretofore accrued hereunder. XI. Letter of Licence. Proviso that avoidance shall not extend to anything already done.

IN WITNESS, &c.

XII. *DEED OF COMPOSITION and* INSPECTORSHIP, *executed by Debtors in Trade in Co-partnership: the* COMPOSITION *to be* SECURED *by* PROMISSORY NOTES *of the Debtors. An* ASSIGNMENT *of the Debtor's Property to be made, if required; and if so, the Property to be administered as in Bankruptcy.*

THIS INDENTURE, made the ——— day of ———, 18—, BETWEEN A. B. and C. D., both of ——— Street, in the city of London, warehousemen, and co-partners trading under the firm of A. B. and Company, of the first part; W. X., of &c., and Y. Z., of &c., of the second part; and the several persons whose names and seals are hereunto subscribed and affixed, or who otherwise accede to these presents, being creditors of the said A. B. and C. D. jointly, or of one or other or both of them separately, or of the said A. B. and C. D. jointly, and one or other or both of them separately, of the third part: WITNESSETH as follows:— Parties. *Testatum.*

1. [*Interpretation clause, ut ante*, p. 511, *omitting the clause as to trustees.*] Interpretation clause.

IN CONSIDERATION of the conditional release hereinafter contained the debtors do, and each of them doth jointly and severally hereby covenant with the inspectors, and also and as separate covenants with each of the joint and respective separate creditors of the debtors, as follows:— Covenants by debtors.

2. The debtors, or one of them, their or his executors or administrators, shall, upon the demand of the inspectors, pay or cause to be paid all costs, charges, and expenses incurred or to be incurred in or relating to the suspension of payment of the debtors, and the investigation and adjustment of their To pay costs and expenses.

XII. Deed of Composition and Inspectorship by Traders in Partnership.

respective accounts and transactions, including the costs of and incident to these presents, and any indenture or indentures hereafter to be executed as subsidiary hereto, and the carrying the same respectively into effect.

To pay composition by instalments to be secured by promissory notes.

3. The debtors, or one of them, their or his executors or administrators, shall, on or before the ——— day of ———, 18—, pay or cause to be paid to each of the joint and respective separate creditors of the debtors, such a sum of money or composition dividend as shall be equal to the amount of ten shillings in the pound upon the whole debt of such creditors respectively by four equal instalments of two shillings and sixpence in the pound each, and payable at the times hereinafter respectively mentioned, that is to say, the first instalment to be payable on the ——— day of ———, 18—; the second, &c., &c.; And also the debtors shall forthwith, after the execution of these presents, make and deliver to the inspectors the joint and several promissory notes of the debtors in respect of every such debt for such sums as shall amount to the sum of ten shillings in the pound upon such debts, such joint and several promissory notes, being made in sets of four, whereof each shall be for the payment of two shillings and sixpence in the pound, to or to the order of the creditor in whose favour the note shall be drawn, and the first to be made payable on the ——— day of ———, 18— (*i.e., the date for payment of the first instalment*); the second on, &c., &c.; and such notes shall be delivered to the inspectors in trust to be by them delivered to the said creditors respectively.

Agreements.

And it is hereby agreed and declared as follows, that is to say:—

As to bills of exchange.

4. [*Bills of exchange not to be negotiated without indorsement of assent to composition, ut ante*, p. 498.]

As to proof of debts.

5. [*Debts and claims to be provable as in bankruptcy, ut ante*, p. 498.]

As to valuation of debts, &c.

6. [*Valuations and estimates to be made of debts or claims, ut ante*, p. 499.]

Covenant by debtors.

For the consideration aforesaid the debtors do, and each of them doth hereby jointly and severally, covenant with the inspectors, and also and as separate covenants with each of the joint and respective separate creditors of the debtors, as follows, that is to say:—

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7. Until all and every the several herein contained covenants or agreements by the debtors respectively, and conditions on their respective parts to be performed and observed, shall have been fully performed and observed to the satisfaction of the committee of inspection, the debtors and each of them respectively shall carry on their business and manage and generally deal with their joint and respective separate property, credits and effects, and the rents and profits thereof, and the income arising therefrom, in such manner as the inspectors shall direct; and shall in such manner in all respects as the inspectors shall direct, deal with and if so required accumulate all or any of the proceeds of the moneys, cheques, bills of exchange, notes of hand, and securities for money which the debtors respectively shall receive in the course of such business; and shall keep proper books of account wherein shall be recorded proper entries of all receipts and disbursements and other things necessary to show the true state and condition of their business, and of their joint and respective separate property, credits, effects, and affairs, and preserve all letters received and copies of all letters written by them respectively, and all other documents, and shall allow the inspectors and each of them free access to all such books of account, letters, copies, and documents as aforesaid; and shall, when required by the inspectors, report to them upon the true state and condition of the accounts of the debtors and all their proceedings relating to the said joint and respective separate property, credits, effects, and affairs; and shall upon all matters and questions involving doubt or requiring the exercise of discretion apply for and act upon the advice of the inspectors; and shall at all times and in all respects attend to and act upon such directions or suggestions as the inspectors shall from time to time or at any time give in relation to the business or the joint or respective separate property, credits, effects, or affairs of the debtors, and the carrying on or management thereof, or general dealing therewith respectively.

To carry on business, &c., under inspection, keep proper books, &c., and follow directions of inspectors.

Provided always, and it is hereby agreed and declared as follows:—

8. Any moneys which under the covenant in that behalf contained in the last preceding clause of these presents shall be for the time being existing as an accumulation, and which

Proviso that moneys accumulated shall be applicable

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shall not afterwards with the consent of the inspectors be withdrawn for the purpose of carrying on the aforesaid business, or for the due execution of the powers and provisions of these presents, shall be taken as moneys provided by the debtors in or towards satisfaction of the payments hereinbefore covenanted to be made by them, and shall be applied in or towards satisfaction of such payments accordingly, in the following order (that is to say): First, in or towards payment of the costs, charges, and expenses in the second clause of these presents covenanted to be paid; and, secondly, in or towards payment of the said instalments in the third clause of these presents covenanted to be paid; And the surplus, if any, shall be dealt with, under the direction of the inspectors, as part of the estate of the debtors for the general purposes of the arrangement hereby intended to be made.

(i) to costs;

(ii) to composition;

(iii) to purposes of this arrangement.

On default by debtors in performance of covenants, inspectors may require them to execute a trust deed for benefit of creditors.

9. If at any time during the continuance of the arrangement hereby entered into, (but not until default shall have been made by the debtors or one of them in the performance or observance of some or one of the several herein contained covenants by them respectively, or conditions on their respective parts to be performed or observed, or in the performance or observance of some part or parts of such covenants or covenant, or condition or conditions respectively,) the inspectors shall, by writing under their hands, require the debtors or either of them, or their respective heirs, executors, or administrators, or such of them as shall for the time being be lawfully or equitably seised or in possession of or entitled to such parts of the joint and respective separate property, credits, and effects belonging to the debtors or either of them on the day of the date of these presents, or on the day of the date of the requisition, or acquired in the interval, or the proceeds thereof as shall then remain undivided or otherwise unapplied for the purposes aforesaid, to assure to such persons as shall be named in such writing, Upon trust for the benefit of the joint and respective separate creditors of the debtors, all or such part of the said joint and respective separate property, credits, and effects, or the proceeds thereof as aforesaid, then and in such case the persons to whom respectively such requisition in writing shall be addressed shall, with all convenient speed thereafter, at the expense of the said joint or respective separate property, credits, or effects, or the proceeds

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thereof, as the case may be, and in such manner as the inspectors shall require, assure such parts of the said joint and respective separate property, credits, and effects or proceeds thereof so remaining undivided or unapplied; Except such parts thereof as do or shall consist of particulars the assurance whereof would work a forfeiture of the same, or as consist of necessary wearing apparel of the debtors respectively, or their respective families, but the particulars of such parts of the said joint and respective separate property, credits, and effects as under this agreement shall be assured, being previously, if required by the inspectors, verified by statutory declaration or other reasonable and sufficient evidence: Upon trust, at such times and in such manner as the trustees shall think fit, to obtain possession of, sell and convert into money, the said premises hereinbefore agreed to be assured, with power to sell either by public auction or private contract or otherwise, and in the case of any policies of assurance either by surrender to the offices by which the same have respectively been granted, or otherwise, and generally in such manner and upon such terms and subject to such special or other stipulations as the trustees shall think fit, and with power to buy in the said premises or any part thereof at any sale by auction, and to rescind or vary any contract for sale, and afterwards to sell in manner aforesaid without being answerable for loss; And for the purposes aforesaid to execute and do all such assurances and things as they shall think fit; And with power until sale or conversion into money of the said premises or of any part thereof to let, manage, and employ, and repair, improve, and insure against loss or damage by fire or otherwise, and generally deal with the same as they shall think fit, and as trustees in bankruptcy are authorized to do under like circumstances; And also with power, if they shall think fit, to employ any person in the execution of the trusts and powers of the indenture or indentures making such assurance as is hereinbefore agreed to be made, with such allowances or payments as they shall think reasonable, and as trustees in bankruptcy are authorized to make under like circumstances; And also with power to deposit all moneys, cheques, bills of exchange, notes of hand, and securities for money which shall have come to their hands under the trusts of the said indenture or indentures in their names at the bank of Messrs. ——— and Company, of ——— Street, in the city of London, or with such other

XII. Deed of Composition and Inspectorship by Traders in Partnership.

bankers as the trustees shall think fit; And also with power to enter into arrangements with persons holding any charges, incumbrances, liens, or other securities upon or against any part of the trust premises for selling and absolutely assuring the same to them respectively, at such prices or values and upon such terms as the inspectors shall think fit; And also with power to pay creditors having any mortgages, liens, or other securities upon any part of the trust premises the full amount secured by such mortgages, liens, or securities for the purpose of obtaining possession of the part of the trust premises whereon the same may subsist, but so that the moneys so to be paid do not, in the judgment of the inspectors, exceed the value of the part of the trust premises subject to such mortgage, lien, or security; And also with power to submit to arbitration any differences or disputes which may arise with any person whomsoever respecting the trust premises, or any demand thereon, or in any manner relating thereto, and to abide by the award thereupon made; And also with power to appoint new trustees, and with such other powers as to the inspectors shall seem reasonable; And upon trust, out of the moneys which shall come to their hands under the trusts of the indenture or indentures making such assurance as is hereinbefore agreed to be made, to pay and retain such of the costs, charges, and expenses in the second clause of these presents covenanted to be paid, in respect whereof default shall have been made in the payment thereof pursuant to such covenant; And to apply and administer the surplus of the said moneys for the benefit of the joint and respective separate creditors of the debtors in like manner as if the debtors had been, at the date of these presents, duly adjudged bankrupts; And to divide the surplus (if any) between the debtors or their respective executors, administrators, or assigns, according to their respective rights and obligations.

On execution of trust deed, debtor's books of account, &c., to be handed over, &c.

10. Simultaneously with the making of the assurance hereinbefore agreed to be made, the person or persons respectively to whom such requisition in writing as aforesaid shall be addressed shall deliver over to the inspectors all the deeds, books of account, vouchers, bonds, bills, notes, and other securities, letters, writings, and things in his or their possession or custody, or under his or their control, constituting part of, or in anywise relating to such parts of the said premises as are hereinbefore agreed to be assured; And also shall execute and do all such assurances and things, and give

all such information and explanation required by the inspectors, as shall be necessary or proper for effectuating the purposes mentioned or referred to in the last preceding clause of these presents, or any of them.

XII. Deed of Composition and Inspectorship by Traders in Partnership.

11. The debtors respectively, and their respective heirs, executors, or administrators, shall not, without the consent of the inspectors in writing under their hands previously obtained, assure, alienate, or incumber the premises hereinbefore agreed to be assured, or any part thereof, or the rents, profits, or income thereof, or of any part thereof; And also shall not respectively do or knowingly suffer any thing whereby any creditors may obtain any security for their respective debts, or any part thereof, or any preference or priority of payment thereof, or of any part thereof, before any other of such creditors.

Debtors not to alienate property without consent.

12. The inspectors shall at all times hereafter, and whether or not such assurance as is hereinbefore agreed to be made shall have become enforceable, and until the same shall have been made or ceased to be enforceable, have full right to enter into and upon all or any part of the business or other tenements or hereditaments of the debtors, or either of them, and there or elsewhere to seize and take possession of all or any part or parts of the present or future property or effects, or the proceeds thereof hereinbefore agreed to be assured: And any such property or effects so seized, or taken possession of by the inspectors, shall be held by them upon the trusts, and with and subject to the powers, provisoes and declarations hereinbefore agreed to be given in connection with the assurance hereinbefore agreed to be made.

Power for inspectors to seize property before execution of trust deed.

13. In consideration of the premises, the debtors do and each of them doth hereby appoint the inspectors to be, during the continuance of this inspection, the attorneys of them the debtors and each of them, and their respective executors or administrators, and in their and each of their names, or otherwise, to demand, sue for, recover and receive, and take possession of all goods, chattels and effects, account books, moneys, negotiable or other instruments, or securities belonging to the joint or respective separate estates of the debtors, and being either in the United Kingdom or abroad, and to give receipts for the same, and to endorse and transfer all bills of exchange, promissory notes or other securities, bills of lading and other instruments relating to the ownership of the said property: And also in the name of them the

Power of attorney.

XII. Deed of Composition and Inspectorship by Traders in Partnership.

debtors and each of them, and as their and his act and deed, or otherwise, to execute any such indenture or indentures making such assurance as aforesaid, and to execute and do all deeds and documents, acts, matters and things which may be necessary or expedient for the purpose of executing and carrying into effect the powers, trusts and provisions of these presents, and of the indenture or indentures as aforesaid, if and when the same shall be executed respectively, and for the purposes aforesaid, or any of them, to appoint delegates or substitutes, and to execute and grant powers of attorney, or authorities, to any person or persons in any countries or places whatsoever, to execute or do any such instruments, acts, matters or things as aforesaid, or to collect or get in any part of the said estate: And the debtors and each of them, and their respective executors or administrators, shall and will ratify and confirm all such deeds, instruments, acts and things as aforesaid, and shall and will from time to time, upon the request in writing of the inspectors, execute and do all such deeds, instruments, acts and things as may be necessary for granting or conferring to or upon the inspectors, or any such delegate or substitute as aforesaid, such further or other powers as the inspectors shall require for the purposes aforesaid, or any of them.

Conditional release of debtors.

14. In consideration of the premises the parties hereto of the third part do and each of them doth hereby, but subject to the agreements and declarations herein contained, and conditionally upon such assurance as is hereinbefore agreed by the debtors to be made upon the requisition of the inspectors being, if required, duly made to the satisfaction of the inspectors (and of the fact that it has been so made, the certificate in writing of the inspectors under their hands shall be conclusive evidence), release the debtors, and each of them, their and his heirs, executors and administrators, estates and effects from all debts, sums of money, accounts, actions, claims and demands, for the payment and satisfaction of which provision is made by these presents.

Provided always, and it is hereby agreed and declared between and by all the parties to these presents as follows, that is to say:—

Savings of rights of secured creditors.

15. Nothing herein contained shall discharge or prejudice any mortgage, lien or security on any part of the property

XII. Deed of Composition and Inspectorship by Traders in Partnership.

of the debtors, or either of them, or of any other persons; but creditors holding such mortgage, lien or security, shall be entitled to receive the said composition dividend and notes, and to participate in the proceeds of the trust premises in the event of the arrangement hereby entered into being carried into effect by realization thereof, only upon the same terms as those upon which they would have been entitled to prove in bankruptcy, and the joint and respective separate creditors of the debtors shall retain all their rights and remedies against any persons other than the debtors as if these presents had never been executed; And for the sake of conformity alone, the debtors, or either of them, or their or his heirs, executors, or administrators, may be joined in any actions or other proceedings to be brought or instituted by any of the said creditors against any such other persons; And no surety, or person liable for the debtors, or either of them, who shall have paid all or any part of the debt for which he is surety or liable, shall be entitled to any further or other composition dividend or note out of the joint or respective separate property or effects of the debtors, or out of the proceeds of the trust premises, in the event of the arrangement hereby entered into being carried into effect by realization thereof, or any remedy against the debtors respectively, or their respective heirs, executors, or administrators, or their joint or respective separate property, credits, or effects, than such surety, or person liable as aforesaid, would have been entitled to under the same circumstances if, in the event of the arrangement by these presents entered into being carried into effect by payment of the composition dividend hereinbefore covenanted to be paid, such composition dividend had been the total amount of the dividends which would have been payable under an administration in bankruptcy of the joint and respective separate estates of the debtors, if they had been, at the date of these presents, duly adjudged bankrupts; or, in the event of the arrangement hereby entered into being carried into effect by the realization of the trust estate, then under an administration in bankruptcy of the trust estate as the joint and respective separate estates of the debtors.

In case of execution of trust deed, or of bankruptcy of debtors, creditors to be

16. If, on the one hand, the arrangement by these presents entered into shall be carried into effect by the realization of the trust estate, or if, on the other hand, any adjudication of or receiving order in bankruptcy, or order in bankruptcy, or at

XII. Deed of Composition and Inspectorship by Traders in Partnership.

law or otherwise, shall hereafter take effect against the debtors, or either of them, under or by reason whereof all or any part of the trust estate, or of the joint or respective separate property or effects of the debtors, shall be taken and applied for the benefit of creditors, so as to prevent or avoid the arrangement by these presents entered into, then, and in such respective cases, such of the joint and respective separate creditors of the debtors as shall have received any dividends under these presents shall, notwithstanding anything herein contained, be at liberty to claim, prove, and sue under such realization of the trust estate on the one hand, or under or in such adjudication or receiving order, or other proceeding as aforesaid, on the other hand, for or in respect of their respective debts, except and deducting thereout so much thereof as they may have received as dividends under these presents, or from sources other than the trust estate, or the joint or respective separate property or effects of the debtor.

at liberty to prove for debts, less dividends received.

Power to appoint new inspectors.

17. If any one or more of the inspectors shall die, or depart from England with the intention of permanently residing elsewhere, or shall remain out of England for more than ——— calendar months at any one time, or shall desire to be discharged, or refuse or become incapable or unfit to act, then and in every such case it shall be lawful for the surviving or continuing or other inspector or inspectors, or for the acting executors or executor, or administrators or administrator of the last surviving or continuing or other inspector to appoint a new inspector or inspectors (whether or not being a creditor or creditors of the debtors or either of them) in the place of the member or members so dying or departing or remaining out of England, or desiring to be discharged, or refusing or becoming incapable or unfit to act as aforesaid; and upon every or any such appointment the number of the inspectors may be augmented or reduced: And every inspector so appointed as aforesaid may act and assist in the execution of the powers and provisions of these presents as fully and effectually as if he had been by these presents constituted an inspector.

Inspectors' indemnity clause.

18. The inspectors shall be respectively indemnified and saved harmless by or out of the joint and respective separate property, credits, and effects of the debtors, or by the joint and respective separate creditors of the debtors who shall have in writing assented to or approved of these presents,

according to and in proportion to the amount of their respective debts, against and in respect of all transactions and personal engagements and things whatsoever which the inspectors shall respectively lawfully do or enter into, direct, or sanction, in or concerning the said joint and respective separate property, credits, or effects under these presents, or in relation thereto: And the joint and respective separate creditors of the debtors who shall have in writing assented to or approved of these presents shall ratify, confirm, and abide by the same transactions, engagements, and things in all respects, but so that no creditor shall, by virtue of this present agreement, be liable to pay a larger sum than he shall have received or be entitled to receive, as and by way of dividend, under the provisions herein contained.

Limitation of liability of inspectors.

19. The inspectors shall be respectively chargeable only for such moneys as they shall respectively actually receive, notwithstanding their respectively signing any receipt for the sake of conformity, and shall be answerable only for their own acts, receipts, neglects, or defaults, and not for those of each other, nor for any banker, broker, auctioneer, or other person with whom or into whose hands any moneys or securities may be deposited or come, nor for the insufficiency or deficiency of any stocks, funds or securities, nor for any other loss, unless the same shall happen through their own wilful default respectively: And it shall be lawful for the debtors, out of any moneys which shall come to their hands under these presents, to retain to and reimburse themselves, and to allow to the inspectors all costs and expenses which they shall reasonably incur in or about the execution of the powers and provisions of these presents.

Reimbursement clause.

20. [*Proviso for avoidance of this deed, ante*, p. 517.]

In witness, &c.

Schedule of Creditors.

XIII. *COMPOSITION DEED supplemental to a* Deed of Composition and Inspectorship *and* avoiding *the same.* (*See* Precedent XII.)

Parties.

THIS INDENTURE, made the ——— day of ———, 18—, Between A. B. and C. D., both of ———, in the county of ———, ironmongers, and co-partners trading under the firm of A. B. and Company, and hereinafter called the debtors, of the first part; W. X., of &c., and Y. Z., of &c. (being the inspectors acting under the provisions of the principal indenture hereinafter referred to), of the second part; and all the creditors, joint and separate, of the debtors, and each of them, whose names and seals are subscribed and affixed in and to the schedule hereunder written, or who otherwise accede to these presents, of the third part; and supplemental to an indenture (hereinafter referred to as the principal indenture), dated the ——— day of ———, 18—, and expressed to be made between the same persons as are parties to these presents, and in the same order: WITNESSETH as follows:—

Testatum.

Avoidance of inspectorship deed.

1. The principal indenture and everything therein contained shall (except as to anything heretofore done in pursuance thereof, and without prejudice to any right of action heretofore accrued thereunder) cease and determine, and in lieu thereof it is hereby agreed and declared as follows:—

Debtors to pay expenses.

2. The debtors, or one of them, shall pay all costs, charges and expenses incurred, or to be incurred, in or incident to or consequent on the suspension of payment of the debtors, and the investigation and adjustment of their respective accounts and transactions, including the costs of and incident to the principal indenture and these presents, and the carrying the same respectively into effect.

Debtors to pay composition.

3. The debtors, or one of them, shall within one week after these presents shall have been executed by or assented or otherwise acceded to by all the creditors parties hereto of the third part, pay to each of the said creditors such a sum of money as shall be equal to a composition dividend of ——— shillings in the pound upon the debt of each of such creditors.

Release of debtors.

4. The said composition dividend shall (subject to the

provisoes hereinafter contained) be accepted by the said creditors in full discharge of their respective debts, and the said creditors do hereby respectively (but conditionally upon payment being made of the said composition in manner aforesaid) release the debtors and each of them from their respective debts, and all actions, claims, and demands in respect thereof.

XIII. Composition Deed supplemental to and avoiding Inspectorship Deed.

5. PROVIDED ALWAYS, that nothing herein contained shall in any wise prejudice or affect the securities or rights or remedies of any of the said creditors against any surety or sureties, or any person or persons other than the debtors, or either of them, their or his heirs, executors or administrators, nor any security which any creditor may have or claim for his debt or debts, but nevertheless if such security shall be enforceable against the debtors, or either of them, their or his estate or effects, then in that case such creditor, unless he shall consent to abandon his security, shall be entitled to receive the said composition dividends upon so much only of his said secured debt or debts as may remain after such security shall have been released, or after credit shall have been given for the full value thereof.

Saving rights of secured creditors.

IN WITNESS, &c.

SCHEDULE OF CREDITORS.

XIV. *RELEASE by* CREDITORS *to* DEBTOR *on* PAYMENT *of a* COMPOSITION *previously agreed upon in satisfaction of their Debts.*

THIS INDENTURE, made the ——— day of ———, 18—, BETWEEN the several persons who have by themselves or their respective partners, agents, or attornies, hereunto subscribed and affixed their names and seals respectively, being respectively the creditors of [*debtor*], of &c. (and who are hereinafter referred to as the creditors), of the one part, and the said [*debtor*] (who is hereinafter referred to as the debtor), of the other part: WHEREAS the debtor has for many years past carried on the trade or business of a ——— at ——— aforesaid, and in the course of his said trade or busi-

Parties.

Recital of indebtedness of debtor;

XIV. Release of Debtor.

ness has become indebted to the creditors in the several sums of money which are set opposite to their respective names in the schedule hereunder written: And whereas the debtor being unable to meet his engagements in full, recently proposed to the creditors to pay to them a composition of ——— shillings in the pound upon the amount of their respective debts in full discharge thereof, which they agreed to accept, and they also agreed, upon payment of the said composition, to execute to the debtor such release as is hereinafter contained: And whereas the debtor has in pursuance of the said agreement this day paid to the creditors respectively the said composition of ——— shillings in the pound upon the amount of their respective debts, as the creditors hereby respectively acknowledge: NOW THIS INDENTURE WITNESSETH, that in further pursuance of the said agreement, and in consideration of the premises, each of the creditors, so far as relates to the debt or sum set opposite to his name in the said schedule, hereby acquits, releases, and discharges the debtor, his heirs, executors, and administrators, and his estate and effects, from such debt or sum, and from all actions, claims, and demands whatsoever in respect of the same, which such creditor, his partners, executors, administrators, or assigns now has or have, or at any time hereafter shall or may or but for these presents might have, against the debtor, his estate or effects, for or by reason of the said debt.

of agreement to accept composition;

of payment of composition.

Testatum

Release.

In witness, &c.

[*Signatures and seals of creditors.*]

XV. *RESOLUTIONS for a* Composition *under* Sect. 18 *of the* Bankruptcy Act, 1883.

In the County Court of ———, holden at ———.

In Bankruptcy.

Re [*name of debtor.*]

Dated the ——— day of ———, 18—.

WE, the undersigned, being the statutory majority of creditors present, personally or by proxy, at the first meeting in the above matter, and voting on the following resolutions in accordance with the provisions of the 18th section of the

Bankruptcy Act, 1883, hereby resolve, subject to the approval of the Court (*a*), to entertain the proposal of the debtor for a composition in satisfaction of the debts due from him to his creditors upon the terms following :— XV. Resolutions under Bankruptcy Act, 1883, Sect. 18.

1. That all debts which would be payable in priority to other debts if the estate of the above-named debtor were being administered in bankruptcy shall be paid in full within ——— days after the approval by the Court of this composition. Preferential debts to be paid in full.

2. That a composition of ——— shillings in the pound shall be accepted in full satisfaction of the debts due to the creditors other than debts so to be paid in full as aforesaid. Composition to be accepted.

3. That such composition shall be payable as follows: ——— shillings in the pound in three months, ——— shillings in the pound in six months, and ——— shillings in the pound in nine months from the date of this resolution. The payment of such several instalments to be guaranteed by [A. B.,] of &c., as surety for the debtor. Composition to be paid by instalments, guaranteed by surety.

4. That the payment of the several instalments shall be secured by the joint and several promissory notes of the debtor and his surety. Instalments to be secured by promissory notes.

5. That the composition so proposed and entertained as aforesaid shall be carried out under and by means of a deed to be executed by the debtor and his surety, and on behalf of the creditors by the trustee, and containing such covenants, trusts, powers, and provisions as are contained in a deed, the draft whereof has been produced at this meeting (*b*). Composition to be carried out by deed.

And we hereby also resolve that [C. D.,] of &c., shall be, and he is hereby appointed to be, the trustee for the purpose of carrying out the composition so proposed and entertained as aforesaid (*c*). Appointment of trustee.

[*Signatures of creditors.*]

(*a*) The Court will apparently refuse to approve of a composition where any facts are proved which would disentitle a bankrupt from obtaining an absolute order of discharge under sect. 28 of the Bankruptcy Act, 1883: see *Ex parte Young*, W. N. 1885, p. 12.

(*b*) The Bankruptcy Act, 1883, does not contain any provisions for embodying the terms of a composition in a deed, and when the estate is small and the circumstances of the case are simple, this clause may be omitted.

(*c*) For form of resolution confirming a composition, see Appendix to the foregoing Dissertation, *ante*, p. 479.

XVI. *COMPOSITION DÉED between a Debtor and his Creditors pursuant to a* RESOLUTION *under* SECT. 18 *of* THE BANKRUPTCY ACT, 1883: *A* SURETY *joins to secure the Composition.*

Parties.

THIS INDENTURE, made the ——— day of ———, 18—, BETWEEN [*debtor*], of ———, in the county of ———, grocer (hereinafter called "the debtor"), of the first part, [*surety*], of &c., (hereinafter called the surety), of the second part and [*trustee*], of &c., (hereinafter called the trustee), of the third part: WHEREAS the debtor recently presented in the County Court of ——— aforesaid, holden at ———, a bankruptcy petition alleging his inability to pay his debts, and the said Court thereupon made a receiving order for the protection of his estate: AND WHEREAS at the first meeting of the creditors of the debtor, held on the ——— day of ———, 18—, at ———, it was resolved by the statutory majority of the creditors present personally or by proxy at the said meeting, and voting on the resolution, that, subject to the approval of the Court, the proposal of the debtor for a composition in satisfaction of the debts due from him to his creditors, should be entertained upon the terms (amongst others) that the composition so proposed and entertained as aforesaid, should be embodied in and carried into effect under a deed to be executed by the debtor and his surety, and on behalf of the creditors by the trustee, and containing such covenants, trusts, powers, and provisions, as were contained in a deed, the draft whereof had been produced at the said meeting, being these presents: And it was also resolved that the said [*trustee*] should be, and he was duly appointed trustee for the purpose of carrying out the said composition: AND WHEREAS the public examination of the debtor was concluded on the ——— day of ———, 18—: AND WHEREAS at a subsequent meeting of the creditors, held on the ——— day of ———, 18—, at ———, aforesaid, the said composition so entertained and accepted as aforesaid, was duly confirmed by a resolution passed by a majority in number, representing three-fourths in value of all the creditors who had then proved their debts.

Recitals: of bankruptcy petition by debtor;

of resolution for composition;

of examination of debtor;

of confirmation of resolution.

NOW THIS INDENTURE WITNESSETH, as follows:— *Testatum.*

In pursuance of the said resolutions, and in consideration of the premises, the debtor hereby covenants with the trustee as follows:— Covenants by debtor.

1. The debtor, or his executors or administrators, shall, to the satisfaction of, but without the necessity of any demand on the part of the trustee, pay all costs, charges, and expenses incurred, or to be incurred, in or relating to the suspension of payment of the debtor, and the investigation and adjustment of his accounts and transactions, including the costs of and incident to the above-mentioned proceedings under the Bankruptcy Act, 1883, and preliminary and incident thereto, and of and incident to and consequent upon these presents, and the carrying the same respectively into effect, and such costs, charges, and expenses, so far as they shall have been incurred up to and inclusive of the date of the delivery of the composition notes hereinafter referred to, shall be paid prior to or at that date, and, so far as they shall be incurred after that date, shall be paid as soon as conveniently may after the same have been incurred. To pay costs.

2. The debtor, or his executors or administrators, shall, on or before the ——— day of ——— next, pay in full to the several persons mentioned in the schedule hereunder written, the sums placed opposite their respective names in the same schedule, being the whole of the preferential debts due by him, and which are, by the Act aforesaid, directed to be paid in priority to other debts in the distribution of the property of a bankrupt. To pay preferential debts in full.

And the debtor and the surety hereby do, and as separate covenants each of them doth, hereby covenant with the trustee as follows:— Joint and several covenants by the debtor and surety.

3. The debtor and the surety, or one of them, or their or his executors or administrators, shall pay to each of the creditors of the debtor such a sum of money or composition dividend as shall be equal to the amount of ——— in the pound upon the whole debt of the creditors respectively, by ——— instalments, being of the amounts and payable at the times respectively hereinafter mentioned, that is to say, the first instalment being one of ——— in the pound, and payable at ——— months from the date of the registration of the afore- To pay composition dividend by instalments.

XVI. Composition Deed under Sect. 18 of the Bankruptcy Act, 1883.

said extraordinary resolutions, the second instalment being one of ——— in the pound, and payable at ——— months from the same date, and so on until the end of the ———th and last instalment.

To make and deliver promissory notes to secure payment of composition.

4. The debtor and the surety shall, in respect of every debt as aforesaid, and as a security for the several instalments of the said composition thereon hereinbefore mentioned, forthwith make and deliver to the trustee, in trust to be by him delivered to the creditors respectively entitled thereto, the joint and several promissory notes of the debtor and the surety, made payable to or to the order of such creditors respectively, and corresponding in point of amount and time of payment to, and securing the said several instalments for such a sum as shall amount to the sum of ——— in the pound upon the debt of each creditor.

Provided always, and it is hereby agreed and declared as follows:—

5. [*Power for trustee to arrange with creditors, ut ante*, p. 499, clause 14] (*a*).

6. [*Power for trustee to compromise debts due to debtor, and to refer disputes to arbitration, ut ante*, p. 499, clauses 15, 16] (*a*).

As to liability of surety.

7. Although as between the debtor and the surety respectively the surety is only surety for the debtor, yet, as regards the creditors of the debtor and the holders of the said promissory notes so to be made and delivered as aforesaid, the surety is to be considered as a principal debtor, so that the surety shall not be released or exonerated by time being given to the debtor, or by any other dealing between the creditors of the debtor or any of them, their, or any of their heirs, executors or administrators, partners or assigns, and the debtor, his executors or administrators, or by any act or omission of the creditors of the debtor, or any of them, their or any of their heirs, executors or administrators, partners or assigns, or by any other thing whatsoever whereby the surety as surety only for the debtor would be released or exonerated.

(*a*) These clauses appear to be necessary, inasmuch as the statutory powers for the purposes referred to are only exercisable by trustees, with the sanction of a committee of inspection, the appointment of which is not here contemplated. The words at p. 499, in clause 14, "who shall refuse to execute or accede to, or approve of these presents," will of course be omitted.

XVI. Composition Deed under Sect. 18 of the Bankruptcy Act, 1883.

8. The surety shall not, during the continuance of his liability under these presents, accept or take any counter-security or guarantee whatsoever for the purpose of indemnifying himself from or against such liability or any part thereof, and shall not, if the debtor shall be adjudged bankrupt before the said composition dividend hereinbefore agreed to be paid shall have been fully paid, set off or attempt to set off the said liability or any part or parts thereof against any debts which may be due or owing by him to the debtor, or prove or attempt to prove against the estate of the debtor in respect of such liability or for any payment in respect thereof.

Surety not to take security from debtor.

And it is hereby agreed and declared as follows (*b*) :—

9. The said composition shall be accepted by all the creditors of the debtor respectively (other than the creditors mentioned in the schedule hereunder written in respect of the amounts set opposite their respective names in the same schedule), in full satisfaction and discharge of their several and respective debts and demands against the debtor: And unless and until default shall be made in payment of the said composition, or some part thereof, at the times hereinbefore mentioned, these presents shall operate and have the same force and effect as an order of discharge which has taken effect under the Bankruptcy Act, 1883, and this agreement may be pleaded and used in bar of, or as a defence or answer to every action or other proceeding commenced or prosecuted by any of the creditors in respect of any debt, claim, or demand, proved under the above-mentioned proceedings, or provable under these presents in like manner

Acceptance of composition.

(*b*) It does not appear to be necessary to insert, in a deed embodying the terms of a statutory composition, any clause for saving the rights of secured creditors, or the rights of creditors against persons other than the debtor. The rights of secured creditors are expressly reserved by law. See sect. 9, subsect. (2), sect. 39, and sched. 2, rules 9—17 inclusive, of the Bankruptcy Act, 1883. And it is now settled, after some difference of opinion, that the acceptance of a composition under the bankruptcy law operates as a discharge in bankruptcy so as not to prejudice the rights or remedies of creditors against sureties and persons other than the debtor. See *Megrath* v. *Gray*, L. R., 9 C. P. 216; *Ex parte Jacobs*, L. R., 10 Ch. A. 211.

XVI. Composition Deed under Sect. 18 of the Bankruptcy Act, 1883.

and with the same effect as an order of discharge under the Bankruptcy Act, 1883, might have been pleaded or used if the debtor had been at the date of these presents duly adjudged bankrupt.

Appointment of new trustees.

10. The power of appointing a new trustee or trustees in the place of the present or any future trustee or trustees of these presents who shall die or desire to be discharged, or refuse or become unfit or incapable to act, shall be exercisable by means of a special resolution of the creditors (*c*).

Avoidance of deed, if composition is not approved by Court, or if it is annulled.

11. These presents shall have no operation or effect unless and until the said composition shall have been approved by the Court; and if at any time after such approval the said composition shall be annulled, or if the bankrupt shall die (*d*), then these presents and everything herein contained shall (except as to anything theretofore done in pursuance of, and without prejudice to, any right of action accrued under these presents) cease and be void (*e*).

In witness, &c.

Schedule of Preferential Debts.

(*c*) If the creditors appoint more persons than one to the office of trustee under a composition (as to which see *ante*, p. 425), the following clause may be here inserted:—

10A. It is hereby declared that all acts by these presents, or by the Bankruptcy Act, 1883, authorized or required to be done by trustees, shall be done by all the trustees [*or* by not less than ——— trustees] concurrently.

(*d*) By sect. 108 of the Bankruptcy Act, 1883, it is enacted that "If a debtor by or against whom a bankruptcy petition has been presented dies, the proceedings in the matter shall, unless the Court otherwise orders, be continued as if he were alive."

(*e*) The words in parentheses are merely declaratory, and may be omitted if desired, for it is expressly provided by sect. 18, sub-sect. 11 of the Act of 1883, that the annulment of a composition or scheme is to be "without prejudice to the validity of any sale, disposition or payment duly made, or thing duly done under or in pursuance of the composition or scheme."

XVII. Deed of Inspectorship (*a*) *embodying Terms of a* Scheme of Arrangement *under* Sect. 18 *of the* Bankruptcy Act, 1883.

THIS INDENTURE, made the ——— day of ———, 18—, Between [*debtors*], all of ———, in the county of ———, merchants and shipowners (hereinafter called "the debtors"), of the one part; and A. B., of &c., C. D., of &c., and E. F., of &c., of the other part: Whereas the said [*debtors*] have for some years past carried on business at ——— aforesaid as merchants and shipowners: And whereas a bankruptcy petition was, on the ——— day

Parties.

Recitals: of debtor's business;

of bankruptcy petition and receiving order;

(*a*) This precedent is adapted from a deed under the provisions of which the administration was conducted of the joint and separate estate of a firm of merchants and shipowners who had, up to their suspension of payment, carried on a very extensive business in this country and abroad. This deed was modelled on the inspectorship deed which gave rise to the action of *Strick* v. *De Mattos*, 3 H. & C. 22. That case was decided under the Bankruptcy Act, 1861, sect. 192, whereby it was required, in order that a deed of composition or arrangement should be binding on creditors generally, that the provisions thereof should be reasonable. The action was brought on a bill of exchange; the composition deed was pleaded as a defence. The plaintiff demurred on the ground that the deed contained unreasonable provisions, objections being specially made to clauses contained in the deed, and corresponding to clauses 18, 22 and 30 of the precedent in the text. It was held that neither these nor any other of the provisions complained of were unreasonable, and that the deed was binding on non-assenting creditors: *Strick* v. *De Mattos*, 3 H. & C. 22; affirmed in the Exchequer Chamber, *ibid.* 987; *S. C.*, L. R., 1 Ex. 91, sub nom. *Wood* v. *De Mattos*. The present Bankruptcy Act also requires a statutory composition or scheme to be reasonable (see sect. 18, sub-sect. (6), *ante*, p. 409); but of course it does not necessarily follow that a provision which was held to be reasonable under the Act of 1861 will be held to be reasonable under the present Act. This question can only be settled by judicial decisions, the course of which cannot as yet be predicted with confidence.

Clause 30, which has been pronounced under the former Act to be reasonable, is here inserted with the intention of avoiding any inconvenience which may arise in the case of instruments drawn with the view to extensive and complicated administrations by reason of there being no power given by the present Act, either to the creditors or to the Court, to make any amendment or alteration in such instruments: see rule 162, *ante*, p. 412.

In the precedent in the text no trustees are made parties, and consequently clauses have been inserted giving to the committee of inspection powers corresponding to those given to trustees by the Act.

XVII. Deed of Inspectorship embodying Scheme of Arrangement under Sect. 18 of the Bankruptcy Act, 1883.

of ———, 18—, presented in the High Court of Justice against the said [*debtors*], and the said Court thereupon made a receiving order for the protection of their joint and respective separate estates: And whereas, at the first meeting of the creditors of the said [*debtors*], held on the ——— day of ———, 18—, at ———, it was resolved by the statutory majority of the creditors present personally or represented by proxy at the said meeting, and voting on the resolution, that, subject to the approval of the Court, the proposal of the said [*debtors*] for a scheme of arrangement of their affairs should be entertained upon the terms following, that is to say:—First, that provision should be made for payment of all costs, charges, and expenses of and incidental to the presentation of the petition and all proceedings thereunder, and of the convening and holding the first meeting, and of the preparation and passing of the resolution and of the resolution confirming this scheme, and all expenses incurred by or payable to the official receiver for remuneration or otherwise; and, secondly, that proper provision should be made for the immediate payment in full of all debts which [illegible]d be payable in priority to other debts if the joint and respective separate estates of the debtors were being administered under an adjudication of bankruptcy; and, thirdly, that time should be given to the debtors for the payment of their debts, other than such preferential debts as aforesaid, by instalments, with liberty to carry on their business under inspection; and, fourthly, that a deed should be prepared, containing such covenants, trusts, powers, and provisions as the said [*inspectors*] should approve, for the purpose of embodying and effectuating the foregoing scheme of arrangement: And whereas at the same meeting it was resolved that the said [*inspectors*] should be, and they were thereby appointed, the committee of inspection of the creditors of the said [*debtors*]: And whereas the public examination of the said [*debtors*] was concluded on the ——— day of ———, 18—: And whereas, at a subsequent meeting of the creditors, held on the ——— day of ———, 18—, at ——— aforesaid, the said scheme of arrangement so entertained and accepted as aforesaid was duly confirmed by a resolution passed by a majority in number representing three parts in value of all the creditors who had then proved their debts: And whereas these presents have accordingly been pre-

of first meeting of creditors and resolution for scheme of arrangement;

of confirmation of scheme by subsequent meeting;

of approval of this deed by

pared, and a draft hereof has been submitted to and approved of by the said [*inspectors*]. the committee of inspection.

NOW THIS INDENTURE WITNESSETH, as follows:— *Testatum.*

1. In the construction of these presents the expression "the debtors" shall mean the parties hereto of the first part, and the expression "the committee of inspection" shall mean the parties hereto of the second part, and the survivors or survivor of them, and the members or member of the committee of inspection of the creditors for the time being; and words in the singular number shall mean also the plural; and words in the plural shall mean also the singular; and words denoting males shall include females; and words denoting persons shall include corporations, companies, and copartnerships in England and elsewhere, except where such interpretation would be repugnant to the intention of these presents as herein appearing. Interpretation clause.

AND THE DEBTORS do, and each of them doth jointly and severally, hereby covenant with the said [*inspectors*] as follows:— Joint and several covenants by debtors;

2. The debtors and each of them will, upon the request and direction and under the inspection and control of the committee of inspection, and for such period or periods respectively as they shall require, collect and get in and convert into money their joint and several estates and effects as well in Great Britain as elsewhere. to get in the estate (*b*);

4. The debtors shall not nor will any of them in any way attempt to withdraw themselves or himself, or their or his estates, from the engagements in these presents contained, and on their and his part to be observed and performed, or in anywise frustrate the arrangements intended to be under these presents carried into effect, and shall not nor will, without the not to do anything to impede the arrangement;

(*b*) No provision as to the delivery by the debtor of a statement of his liabilities should be inserted in a deed embodying the terms of a statutory composition or scheme of arrangement. The debtors are required by the Act within a limited time after the receiving order is made against them to submit to the official receiver a statement, verified by affidavit, of their partnership affairs and also of their respective separate affairs; and such statements are to be open to the inspection of the creditors: see sect. 16 and rule 196, stated *ante*, pp. 396, 397.

XVII. Deed of Inspectorship embodying Scheme of Arrangement under Sect. 18 of the Bankruptcy Act, 1883.

approbation of the committee of inspection, release nor postpone payment of, or compromise, submit to arbitration, or otherwise prejudice or affect any debt, claim, or demand due or accruing to them, the debtors, jointly, or to either of them separately, nor bring or prosecute or interfere with any action or suit in respect of the same but upon the request and direction and under the inspection and control of the committee of inspection.

nor release any debt.

At request of committee of inspection to bring or defend actions; to submit differences to arbitration;

5. The debtors, and each of them as occasion may require under the indemnity of these presents, shall and will from time to time commence and prosecute, or resist and defend, all actions, suits, attachments, sequestrations, extents, or executions, or other proceedings relating to the premises, and also upon the like request and direction, and under the like inspection and control, submit, or consent to the submitting, to arbitration, or to the opinion or decision of counsel, any difference or question relating to or affecting the same: And also upon the like request and direction in manner aforesaid enforce or perform any lawful awards, and compromise or compound any debt, claim, or demand, whether due, or to be made by or due, from or against them jointly, or any of them separately, or accept security therefor, or give time for payment thereof, or refrain to sue therefor; and also upon the like request and direction, and in manner aforesaid, make any arrangements or adjustments with any of the creditors respectively for ascertaining or fixing the amount of their respective debts, claims, or demands, or respecting any securities held by them respectively for the same, or the valuation, selling, or realising of such securities, or the liquidation and payment of the debts, claims, or demands of any of the creditors respectively holding security where the value of the securities held shall exceed the amount of the debt, claim, or demand, or taking of a transfer of the security: And also upon the like request and direction, and in manner aforesaid, shall and will sell and dispose of any part of the said joint and respective separate estates to any one or more of the creditors respectively, by way of payment, or on account and in part of his, her, or their debts, dividends, or otherwise, but not so as thereby to give any of the creditors respectively a priority or advantage over the others of the creditors respectively.

to make arrangements with creditors;

to sell any part of estate to creditors;

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6. The debtors and each of them, subject to and after payment of the costs, charges, and expenses of and attending these presents, and of and incident to the present arrangements of their affairs, and of all other payments hereinafter mentioned or referred to, shall and will, from time to time, upon the like request and direction and in manner aforesaid, divide, or aid and assist in dividing, the money arising under these presents rateably among the creditors respectively in manner hereinafter mentioned.

to apply moneys received after payment of costs in discharge of liabilities;

7. The debtors and each of them shall and will also from time to time deposit such of the moneys, and securities for money, which shall constitute or be produced from the said joint and separate estates respectively as shall be received by them or him, in such bank or banks, or otherwise, as the committee of inspection may from time to time direct, to the credit of an account to be kept in respect of the said estates respectively, in such names or name as the committee of inspection shall from time to time direct or sanction, and such account may from time to time be altered and transferred to and kept in the names or name of the committee of inspection, or of any members or member thereof, or of such other persons or person as the committee of inspection shall direct; and the money standing at the credit of any such account shall be payable upon such cheques or orders, or otherwise, as the committee of inspection may from time to time direct; and the debtors shall not nor will, nor shall nor will either of them afterwards, draw out any part of such moneys except with the consent of the committee of inspection, nor with such consent except only for the purpose of the same being applied as in these presents mentioned, or as the committee of inspection shall, for the purposes of these presents, for the time being direct.

to deposit moneys till applied in bank.

Not to engage in any other business so as to incur new debts (*c*).

8. The debtors shall not nor will, nor shall nor will either of them, engage in any other business, so as to incur any new debt, or enter into any new contract, so as to prejudice

(*c*) As to debts incurred by trading subsequent to bankruptcy or composition, see *Troughton* v. *Gitley*, Amb. 630; *Tucker* v. *Hernaman*, 4 De G., M. & G. 395; *Ex parte Bourne*, 2 Gl. & J. 137; *Ex parte Ford, Re Caughey*, L. R., 1 Ch. A. 521; *Ex parte Robertson*, L. R., 8 Ch. A. 962; *Ex parte Russell, Re Winn*, 2 Ch. D. 424; *Ex parte Banks, Re Dowling*, 4 Ch. D. 689; *Ex parte Bolland, Re Dysart*, 9 Ch. D. 312.

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or affect any part of the joint or respective separate estates, or give to any of the creditors respectively any security or any preference or priority above or over any others or other of the creditors respectively.

To keep proper accounts.

9. The debtors and each of them shall and will from time to time keep proper books of account, and make proper entries, showing all receipts, payments, and transactions relating to the said joint and respective separate estates, and at all times, when required so to do, make out correct and proper accounts and balance sheets of or showing the business and affairs of the joint and respective separate estates, and also furnish true and correct copies thereof to the committee of inspection, and particularly shall and will, once in every month, if required so to do, make out accounts of all cash transactions relating to their and his said estates respectively, and also, if required so to do, deliver to them or him correct copies thereof, and shall and will preserve for and deliver to them and him all letters written to and copies of letters written by the debtors and each of them, and all documents and papers concerning the estates respectively, and at all times procure and show to the committee of inspection all such books of account, accounts, letters, documents, and papers, and the several vouchers referring thereto, and give all information and assistance in the power of the debtors or any of them, both for the full understanding thereof and for the general conduct of their and his affairs.

To obey directions of the committee of inspection.

10. The debtors and each of them shall and will in all respects obey and conform to the orders and directions of the committee of inspection in or about their and his estates respectively, and execute and sign all such deeds and documents for the purposes of these presents as they or he shall from time to time be required or called upon to do, and wholly wind up their and his affairs under the direction, superintendence, and control of the committee of inspection, and generally shall and will perform and observe all the covenants, provisions, and stipulations herein contained and declared, and on their or his part to be performed and observed respectively.

PROVIDED ALWAYS, and it is hereby agreed and declared as follows:—

Debtors may carry on busi-

11. It shall be lawful for the debtors, with the consent

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and under the direction and control of the committee of inspection, to carry on or conduct for the purpose of winding-up, and to wind up the said business and the affairs and transactions thereof, and the joint and respective separate estates of the debtors under the provisions of these presents; and for the purposes aforesaid to manage and realize the said estates respectively, and particularly to deal with all contracts entered into by the debtors or any of them in such way and manner as the committee of inspection shall think expedient; and it shall be lawful for the committee of inspection, for all or any of the purposes of these presents, to employ or require the assistance of the said debtors and each of them, their and his heirs, executors, and administrators, in the mode and to the extent the committee of inspection shall think proper, with full power to dispense with their or his services, either wholly or for a time, and also from time to time to make and pay to them or him for their or his services such proper remuneration as the committee of inspection shall think fit.

ness, &c., under control of committee of inspection.

12. The committee of inspection may authorize and employ any person or persons to act as their solicitors or solicitor, agents or agent, or as the solicitors or solicitor, agents or agent of the debtors or any of them in England or elsewhere, in getting in or realizing any part of the said joint and respective separate estates, or in inspecting, controlling, ordering or directing all or any matters relating thereto, or in exercising all or any of the powers and authorities herein contained; and the expense of so doing shall be from time to time defrayed out of such and so much of the money and proceeds of the said joint and respective separate estates, or any of them, as would have been applicable and applied to that purpose if the said several estates were being administered under an adjudication in bankruptcy against the said debtors; and to give effect to any such agency or agencies the debtors and each of them shall, at the request of the committee of inspection, appoint any attorney or attornies, joint or several, at any place or places in this country or abroad, but so that the committee of inspection may (as they are hereby authorized and empowered to do) revoke, change, or renew every or any such appointment at their or his discretion: And also that the committee of inspection may act or may employ accountants, clerks or servants, necessary or proper for keeping the accounts, and managing and administering the said joint and

Committee of inspection may employ solicitors, agents, &c., in winding-up the estate.

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separate estates respectively, and every person so acting or employed shall be paid or allowed, out of such and so much of the moneys and proceeds as in this clause before-mentioned, reasonable and proper compensation for such services.

Committee of inspection may make advances on account of contracts, &c.;

13. It shall be lawful for the committee of inspection, if and so often as they may think it for the benefit of the creditors so to do, to make or authorize advances out of and on account of the aforesaid joint and separate estates respectively, as the case may be, in furtherance of the objects contemplated in and by these presents, or any of them, or on account of any contract or mercantile or other operation which shall have been undertaken by the debtors or any of them, as the case may be; and also, in case they shall deem it expedient, to bring, commence, defend, or continue any action or actions, suit or suits, or other proceedings at law or in equity or in bankruptcy, already brought or to be brought concerning the same joint or respective separate estates, the committee of inspection shall or may exercise their discretion in authorizing or requiring the debtors or any of them, as the case may be, or the solicitors or agents of the committee of inspection to commence, defend, continue or prosecute, or to discontinue or compromise the same, and shall and may retain and require payment of all costs, charges, damages and expenses in any wise relating thereto, out of such and so much of the said moneys and proceeds as in the last preceding clause mentioned.

and bring or defend actions, &c.;

and may require debtors to mortgage or sell estate.

14. It shall be lawful for the committee of inspection to obtain, or to authorize or require the debtors or any of them, as the case may be, to obtain advances by way of mortgage or pledge of any part or parts of their or his estates for the purposes of these presents, and for facilitating the winding-up of the said joint and respective separate estates; and also to make or authorize any arrangement or arrangements for the sale to any person or persons, and either upon a valuation thereof or otherwise, of the whole or any part or parts of the said joint and separate estates respectively discharged from any covenant herein contained as to the application of such property so to be sold, and to give, or authorize to be given, time for payment of the consideration or any part thereof, whether by instalments or otherwise, and either with or without security for the same, as the committee of inspection shall think fit, and to authorize the cancellation or variation

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of any contract or contracts for sale and the resale of the property contained in any such cancelled contract or contracts, and also to authorize the transfer or carrying over or variation or surrender of any contract or contracts entered into by the debtors or any of them, as the case may be, and now subsisting, upon such terms in all respects as the committee of inspection shall think most beneficial for the proper administration of the said joint and respective separate estates.

May arrange as to outstanding bills of exchange on being allowed discount;

15. In case there shall be any sum or sums of money owing by or claimable against the debtors or any of them on bills or otherwise which have not yet become payable, and the amount of which would be recoverable by the debtors or any of them against other parties, the committee of inspection may authorize the payment of the said sums of money or a dividend thereon, being allowed discount or rebate for acceleration of payment or otherwise in the same manner and out of such funds as would have been applicable thereto if the sum or sums had been proved or claimed under an adjudication in bankruptcy against the debtors.

to pay in full or arrange with creditors holding securities;

16. It shall be lawful for the committee of inspection in their discretion by and out of the said joint and respective separate estates, as the case may be, and the proceeds thereof, to make or authorize payment in full to, or effectuate or authorize the effectuating of any arrangements which they or he may deem reasonable and for the benefit of the creditors respectively, as the case may be, with any of the creditors respectively, or to or with any other person or persons either holding any goods or property, or bills, or securities, or documents of title of the debtors, or any of them, as the case may be, or in which they or he may be interested by way of security or pledge for money, or having any claim or demand thereon in any manner by way of lien, for the purpose of obtaining possession of the same goods, property, bills, securities, or documents of title exonerated and released from such pledge or lien, claims and demands; provided that the amounts so to be paid shall not exceed the then value of the said goods, property, bills, securities, or documents of title.

to compound debts owing to debtors.

17. It shall be lawful for the committee of inspection in their discretion to compound or authorize the compounding of any debt or debts, or sums of money owing to

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the debtors, or any of them, or to accept or take or authorize the accepting or taking of security for part of the same in full thereof, or to give or authorize to be given further time for payment of any such debt or debts or sum or sums of money, or to refrain from suing for or enforcing any debt or debts, claim or claims which shall, in their or his opinion, be bad or desperate without being answerable for any consequent loss; and likewise in case of any dispute, doubt, or difficulty arising with any person or persons whomsoever, being a debtor or debtors to or creditor or creditors of, or reputed debtor or debtors to, or reputed creditor or creditors of the debtors, or of any of them, or having or making any claim or demand whatsoever against them or him which would be provable under an adjudication of bankruptcy, it shall be lawful for the committee of inspection, at their discretion, to adjust or settle, or to authorize or require the debtors or any of them as the case may be to adjust or settle, the amount of all or any of such claims, demands, or damages in such manner as to the committee of inspection shall seem most advantageous, or if need be to refer the same to arbitration or have the amount of such damage assessed in due course of law.

Application of moneys received,

18. Until such full payment and satisfaction as hereinafter mentioned all the moneys and proceeds to arise from the said joint and respective separate estates and effects shall be

after payment of costs,

applied in the first place in payment of all costs, charges, and expenses incurred or to be incurred in or relating to the suspension of payment of the debtors, and the investigation and adjustment of their joint and separate respective accounts and transactions, including the costs of and incident to these presents and the carrying the same into effect: And in the next place in payment of any sum or sums by these presents authorized to be paid, of any rent or other moneys for or in respect

and rent,

and preferential debts;

of which any part of the same joint and separate estates respectively could be distrained or detained not exceeding the then value of the effects liable to be distrained or detained, and of any wages and salaries and other debts or claims which would be payable in full or in priority to other debts

in payment of dividends to creditors upon the full amount of debts.

under an adjudication of bankruptcy: And in the next place in payment of dividends upon the several debts, claims, or demands of the said creditors respectively until full payment thereof respectively, with interest at the rate of ——— per

cent. per annum on so much thereof respectively as shall, for the time being, remain unpaid.

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19. In case any surplus shall ultimately remain after such payment and satisfaction of the costs, charges and expenses, debts, claims and demands, interest and sums of money hereby authorized to be paid, or otherwise provided for, the same shall belong and be paid over to the debtors, or some or one of them, according to their or his right and interest therein.

Ultimate surplus to belong to debtors.

20. Dividends shall, subject as herein expressed, be made and paid to the creditors respectively, from time to time, at such respective dates and as often as the committee of inspection shall determine, or be of opinion that they have sufficient assets in hand applicable to the payment of such dividends respectively.

As to payment of dividends.

21. It shall be lawful for the committee of inspection to authorize the investment in their names, or otherwise, as they may think fit, of any moneys not immediately required for the purpose of making a dividend or otherwise, in the purchase of parliamentary stocks or public funds of Great Britain, or of exchequer bills, but not in any other mode of investment, with full power from time to time to alter, vary, or dispose of the said stocks, funds, or securities.

Committee of inspection may invest moneys received.

22. It shall be lawful for the committee of inspection from time to time, upon giving seven days' notice to the known creditors resident in England, by circular through the post office addressed to their respective places of business or place of abode, or to the agents or last-known agents in England of such creditors as may be resident abroad respectively, to convene at such time and place, as they or he shall think fit, a general meeting of the creditors, or their agents authorized to act for them, him or her, so far as they respectively shall be known, for the purpose of obtaining advice, direction and concurrence of the creditors in reference to any questions arising under these presents, and the resolutions of the creditors, or of a majority in number representing three-fourths in value of the creditors whose debts amount to 10*l.* and upwards, voting at any such meeting upon any matters specified in the circular calling the meeting, shall be and constitute a valid and sufficient authority to the inspectors for the time being to act in accordance therewith: Provided,

Power for committee of inspection to summon meetings of creditors.

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however, that such resolution be not repugnant to or inconsistent with any of the provisions herein contained: And any of the creditors who shall not be present thereat may vote by any note or notes in writing under their, his or her hands or hand declaring their, his or her assent to or dissent from any one or more of the matters specified in the circular, and such notes may be either absolute or subject to any condition or qualification expressed in such note or notes; and any of the said creditors may by note or notes in writing appoint any other person to act for them, him or her as their, his or her proxy, and the acts of such proxy shall be considered as the acts of the principal.

Debtors to convey and assign property when required.

23. At any time before the whole of the said joint and respective separate estates of the debtors shall have been fully administered, the debtors and each of them shall, if the committee of inspection require the same, effectually convey, assure and assign all their and his said estate and effects remaining outstanding or not divided, to such person or persons as the committee of inspection may direct, in trust to be administered according to the law of bankruptcy among the said creditors respectively, and if any ultimate surplus shall remain after full payment and satisfaction of their respective debts or claims, and of all costs, charges and expenses hereby authorized to be paid, or otherwise provided for them, as to such ultimate surplus; in trust for the debtors and each of them according to their and his right and interest therein.

Power of attorney.

24. Each of the debtors hereby, in consideration of the premises, appoints the said [*inspectors*] and each of them to be his attorney and attorneys in his name or otherwise, and on his behalf to execute any such conveyance, assurance or assignment as aforesaid, and to execute, sign, and do all such deeds, documents, assurances, acts and things, as may be found necessary or expedient in relation to the trusts of these presents and the trust estate, and to give effectual releases and receipts, and to nominate and appoint, and in the discretion of him or them to remove, any substitute or substitutes; the debtors respectively hereby agreeing to confirm and abide by whatsoever the said attorney or attorneys shall do, or cause to be done, in relation to the premises.

Committee of inspection to certify when the estate is

25. If and when the said joint and respective separate estates shall have been fully administered according to the provisions of these presents, the committee of inspection shall

XVII. Deed of Inspectorship embodying Scheme of Arrangement under Sect. 18 of the Bankruptcy Act, 1883.

certify the fact in writing under their hands, such writing to be indorsed upon or to refer to these presents, or in case of such conveyance, assurance, or assignment as is mentioned in article 24 of these presents being made, the same shall be in like manner certified, and either of such certificates (except only for the purpose and to the extent in this present clause hereinafter provided for, and without prejudice to the rights of the creditors to or over the property thereinbefore conveyed or assured to or over any dividends or fund for dividends then provided, but not actually paid to the creditors) shall operate and be a release and discharge to the debtors and each of them, their and each of their heirs, executors and administrators, as fully and effectually and in like manner as an order of discharge under a joint adjudication of bankruptcy against the debtors, and may be pleaded and used accordingly, and as a bar to and in defence of all actions, suits and proceedings against the debtors, or any of them, in respect of any of the debts, claims and demands of all or any of the creditors: PROVIDED, nevertheless, that in case at any time after such conveyance and assignment the debtors, or any of them, shall become or be made or declared bankrupts or bankrupt, and the arrangement hereby made, or the property comprised in any such conveyance or assignment shall thereby be in any way prejudiced or affected, then such release and discharge as aforesaid shall not prevent any of the creditors from coming in under such bankruptcy for any purposes for which they would but for such release and discharge have been entitled to come in.

fully administered.

Certificate to operate as release of debtors (*d*).

But in case debtors shall become bankrupt such release not to prevent creditors from coming in under such bankruptcy.

26. The debtors or any of them may at any time hereafter engage in or carry on any employment or business on

Debtors may engage in

(*d*) Where a statutory scheme of arrangement assented to by the creditors provided that the debtor should be discharged when the committee of inspection should so resolve, it was held that this provision was contrary to the intention of the Bankruptcy Act, 1883, and unreasonable; and accordingly the Court refused its approval to the scheme, notwithstanding that the debtor concurred in asking that it should be approved: *Ex parte Clark*, 13 Q. B. D. 426. In that case, however, *Baggallay*, L. J. (at p. 435), expressed his opinion that if some fixed time was appointed for the discharge of the debtor, or if it was made to depend on some act to be done by the debtor himself when he should obtain his discharge, such a provision would not be regarded as unreasonable. The clause in the text is intended to meet this suggestion.

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their or his own account so far as may be done without incurring new debts, and so far as may not be inconsistent with their and his aiding and assisting in getting in and winding-up the said joint and respective separate estates respectively as aforesaid, and with their and his performance of the several covenants herein contained; nevertheless they and he shall from time to time and at all times, whether before or after such certificate shall have been signed as aforesaid, respectively give all such information of or relating to the said joint and respective separate estates respectively as may be in their or his power respectively, and render all reasonable assistance in the collection, recovery and winding-up thereof respectively under the provisions of these presents.

business on their own account.

Debtors to confirm acts of committee of inspection.

27. The debtors and each of them shall and will at all times execute, do and join in doing all deeds, acts and matters necessary or reasonable for enabling the committee of inspection to execute the several powers in them hereby reposed, and shall and will ratify and confirm all such acts and matters in carrying out these presents as they shall reasonably do.

Power to fill up vacancies in committee of inspection.

28. On a vacancy occurring in the office of a member of the committee of inspection, the surviving or continuing member or members of the committee shall forthwith summon a general meeting of the creditors in manner hereinbefore provided in that behalf, and the meeting so summoned may by resolution, decided by a majority in value of the creditors present personally or represented by proxy at such meeting and voting on the resolution, appoint any person from among the creditors qualified to vote, or the holders of general proxies or general powers of attorney from such creditors, to fill the vacancy.

Indemnity and reimbursement clause.

29. No member of the committee of inspection shall be answerable except in respect of his own acts and defaults, nor for any involuntary losses which may befall the estate by reason or in consequence of anything whatsoever which the committee of inspection or any member thereof shall lawfully do, direct or sanction in carrying out these presents; and the committee of inspection, and every member thereof, shall be entitled out of the said joint and separate estates respectively to retain all costs, charges and expenses actually incurred by them or him in relation to the trusts and purposes of these presents.

XVII. Deed of Inspectorship embodying Scheme of Arrangement under Sect. 18 of the Bankruptcy Act, 1883.

30. And whereas it is intended that the said joint and respective separate estates and effects of the debtors shall be administered under this present scheme of arrangement upon the principles of the Bankruptcy Act, 1883, or as near thereto as the circumstances of the case will permit, Now it is hereby lastly agreed and declared that these presents and everything herein contained shall be construed so as to give effect to such intention: And that in the event of anything herein contained being deemed to be inconsistent with the principles aforesaid, these presents shall be read and construed as if such inconsistent provision or matter were expunged from, and had never been part of these presents, and in lieu thereof the provisions of the said Act or the rules of administration thereunder, as the case may require, shall be substituted for the provision or matter so expunged.

Any part of the scheme which is inconsistent with the Bankruptcy Act, 1883, to be expunged (*e*).

31. These presents shall have no operation or effect unless and until this scheme of arrangement shall have been approved by the Court. And if at any time after such approval the said arrangement shall be annulled, then these presents and everything herein contained shall (except as to anything theretofore done in pursuance of, and without prejudice to any right of action accrued under these presents) cease and be void (*f*).

In witness, &c.

XVIII. *NOTICE of* Meeting *of* Creditors *after an* Adjudication *of* Bankruptcy *to consider a* Proposal *for a* Scheme of Arrangement *under* Sect. 23 *of the* Bankruptcy Act, 1883 (*g*).

In the High Court of Justice.

In Bankruptcy. No. —, of 188—.

Re A. B., a bankrupt.

TAKE NOTICE that a meeting of creditors in the above matter will be held on the ——— day of ———, at ———,

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(*e*) As to the object of this clause, see *ante*, p. 557, note (*a*).

(*f*) See as to annulment of a statutory scheme or composition, *ante*, p. 556.

(*g*) As to summoning meeting of creditors, see *ante*, p. 399.

XVIII. Notice of Meeting of Creditors to consider Scheme under Sect. 23, Bankruptcy Act, 1883.

at ——— o'clock in the ——— noon, for the purpose of entertaining, in accordance with the 23rd section of the Bankruptcy Act, 1883, by a special resolution of the creditors then and there assembled, the proposal of the bankrupt for a composition of ——— in the pound, in satisfaction of the debts due to the creditors under the bankruptcy (such composition to be secured by promissory notes of the bankrupt), and subject to the approval by the Court of a general scheme of arrangement of the bankrupt's affairs, upon the terms of the bankrupt paying all the costs of the bankruptcy, of the annulment thereof, and of his property being held by or under the control of the trustee, for the purpose of securing the said composition, the bankrupt meanwhile carrying on his business under the inspection of the trustee; and on default by the bankrupt in payment of the composition, or on the terms of the scheme of arrangement, then, for the purpose of realising the said property, and dividing the same among the creditors as if the bankruptcy had proceeded, with a reservation of the rights of the creditors against sureties, and in respect of securities and priorities of payment, or upon such other terms (including the embodiment of the terms of the scheme of arrangement in a deed) as may be thought expedient, and with a condition for annulling the order of adjudication.

Dated this ——— day of ———, 18—.

Signed [C. D.],
Trustee.

XIX. *RESOLUTIONS for* ENTERTAINING *Bankrupt's* PROPOSAL *for a* COMPOSITION *and* SCHEME OF ARRANGEMENT *under* SECT. 23 *of the* BANKRUPTCY ACT, 1883.

In the High Court of Justice.
In Bankruptcy. No. ——— of 188—.

WE, the undersigned, being the statutory majority of creditors present, personally or by proxy, at a meeting in the above matter duly held at ——— on the ——— day of ———, 18—, pursuant to notice duly given specifying the

XIX. Resolutions adopting Scheme under Sect. 23 of the Bankruptcy Act, 1883.

object of such meeting, and voting on the following resolutions, in accordance with the provisions of the 23rd section of the Bankruptcy Act, 1883, do hereby resolve as follows, that is to say:—

That proposal for composition be accepted conditionally, on approval by Court.

1. That conditionally upon the approval of the Court being obtained within ——— days, and testified as is required by the 18th and 23rd sections of the Bankruptcy Act, 1883, to the scheme of arrangement contemplated by these resolutions, the proposal this day made by the bankrupt for a composition of ——— in the pound shall be and the same is hereby entertained and accepted by the creditors of the bankrupt, who would have been entitled to receive dividends under this adjudication if the proceedings in bankruptcy had proceeded, in satisfaction of the debts of such creditors proved or provable in this bankruptcy, such composition to be paid by the bankrupt by ——— equal instalments from the ——— day of ———, 18—, to be secured by the promissory notes of the bankrupt.

Order annulling the bankruptcy to be obtained.

2. That upon such approval of the Court being obtained, an order of the Court shall be obtained annulling the bankruptcy, and vesting the property of the bankrupt (except leaseholds and other particulars of an onerous nature) in the trustee, upon the terms and subject to the conditions of the scheme of arrangement contemplated by these resolutions.

That proposed scheme of arrangement be accepted conditionally on approval by Court.

3. That conditionally as aforesaid, the composition shall be accepted by the creditors in satisfaction of the debts due to them, subject to the approval by the Court of a scheme of arrangement of the bankrupt's affairs, upon the terms of the bankrupt paying all costs of and incidental to his bankruptcy and the annulment thereof, and of the arrangement, and of his property, except leaseholds and other particulars of an onerous nature, being held by or under the control of the trustee for the purpose of securing the said composition, the bankrupt meanwhile carrying on his business under the inspection of the trustee, and also paying in full all debts which would be payable in priority in bankruptcy; and on default by the bankrupt in payment of the composition, or in performance or observance of the terms of this arrangement, then for the purpose of realizing the said property, and dividing the same among the creditors, as if the bankruptcy had proceeded, with a reservation of the creditors' rights against sureties and in respect of securities.

XIX. Resolutions adopting Scheme under Sect. 23 of the Bankruptcy Act, 1883.

4. That the terms of the composition and scheme of arrangement contemplated by these resolutions shall be embodied in an indenture to be prepared on behalf of the creditors by Mr. ——— of ———, in the county of ———, solicitor, and such indenture shall, in addition to the provisions specially referred to in the preceding resolutions, contain all such modifications or additions, both generally and particularly with a view to the protection of the interests of the creditors in the event of the said bankruptcy being annulled, as he or his counsel shall think expedient.

That terms of proposed scheme shall be embodied in deed of arrangement.

5. That the trustee shall forthwith apply to the Court to approve of the composition and scheme of arrangement contemplated by these resolutions, and to make an order annulling the bankruptcy and vesting the property of the bankrupt as aforesaid (*a*).

That trustee shall apply to Court for approval.

[*Creditors' signatures.*]

XX. *DEED OF ARRANGEMENT embodying the Terms of a* SCHEME *under* SECT. 23 *of the* BANKRUPTCY ACT, 1883, *after Adjudication of Bankruptcy.*

THIS INDENTURE, made the —— day of ——, 18—,

Parties.

BETWEEN [*bankrupt*], of ——, in the county of ——, of the first part; [*trustee*], of ——, in the county of ——, of the second part; and [A. B.], of &c., [C. D.], of &c., and [F. F.], of &c., of the third part: WHEREAS on the ——— day of ———, 18—, the said [*bankrupt*], who had for some time previously carried on the trade or business of a ——— at ——— aforesaid, was duly adjudged to be bankrupt by the High Court of Justice in Bankruptcy: AND WHEREAS on the ——— day of ———, 18—, at a meeting of the creditors of the said [*bankrupt*], summoned by [X. Y.], of &c., the official receiver in the said bankruptcy (*b*), and held at ———, the said [*trustee*] was by resolution of the creditors

Recitals: of adjudication;

of appointment of trustee, &c.;

(*a*) As to orders annulling the bankruptcy and vesting the property of the bankrupt, see sect. 23, sub-s. 2, of the Bankruptcy Act, 1883, stated *ante*, p. 466.

(*b*) When the debtor is adjudicated a bankrupt, and a trustee has not been appointed previously, the *official receiver* is forthwith to summon a meeting to appoint a trustee. See sect. 21, sub-s. 8, of the Act.

assembled, or represented by proxy, at such meeting appointed trustee in the bankruptcy of the said [*bankrupt*], and the parties hereto of the third part were by a like resolution appointed a committee of inspection for the purpose of superintending the administration of the bankrupt's property by the trustee (*c*): AND WHEREAS the said [*trustee*], with the permission of the said parties hereto of the third part, appointed the said [*bankrupt*] to carry on the said trade or business at ——— aforesaid for the benefit of the creditors: AND WHEREAS on the ——— day of ———, 18—, the Board of Trade gave to the said [*trustee*] a certificate declaring him to be the trustee in the said bankruptcy: AND WHEREAS at a meeting of the creditors held at ——— on the ——— day of ———, of which notice was duly given specifying the object of such meeting, a special resolution of the creditors then and there assembled, or represented by proxy, was passed accepting a proposal for the composition hereinafter mentioned or referred to, being a composition offered by the said [*bankrupt*], subject to the approval by the Court of a scheme of arrangement of the bankrupt's affairs upon the terms hereinafter appearing, and it likewise resolved that upon such approval by the Court the bankruptcy should be annulled, and the property of the bankrupt vested in manner hereinafter appearing, and that the terms of the said composition and scheme should be embodied in an indenture which has been accordingly prepared being these presents: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said special resolution, and in consideration of the premises, it is hereby agreed and declared as follows, that is to say:—

of bankrupt being appointed to carry on trade;

of certificate of Board of Trade;

of special resolution entertaining proposal for composition, &c.

Testatum.

1. In the construction of these presents the expression "the bankrupt" shall mean the party hereto of the first part; "the trustee" shall include the party hereto of the second part, and his heirs, executors, and administrators, and other the trustee or trustees for the time being of these presents; "the committee of inspection" shall include the parties hereto of the third part, and the survivor of them, and other the inspector or inspectors for the time being acting under these presents; and words in the singular number

Interpretation clause.

(*c*) For form of power to fill up vacancies in the committee of inspection, see *ante*, p. 570.

XX. Arrangement under Sect. 23 of Bankruptcy Act, 1883.

shall mean also the plural; and words denoting males shall include females; and words denoting persons shall include corporations, companies, and partnerships in the United Kingdom and elsewhere, except where any such interpretation would be repugnant to the intention of the parties hereto as herein appearing.

And in pursuance of the said special resolution, and in consideration of the premises, it is hereby agreed and declared as follows:—

Scheme of arrangement to be conditional on approval of Court.

2. The whole of these provisions of these presents are conditional upon the approval of the Court (to be testified by the seal of the Court being attached to these presents) being obtained hereto, and if such approval be not obtained within ——— days from the date hereof, these presents and everything herein contained shall (except as to anything theretofore done in pursuance of, and without prejudice to any right of action theretofore accrued under these presents) cease and be void, and the bankruptcy shall proceed as if these presents had never been executed.

Vesting order to be applied for.

3. If in pursuance of the hereinbefore-recited resolution for the annulment of the bankruptcy the Court shall annul such bankruptcy accordingly, the Court shall be requested to make an order appointing the trustee as the person in whom the property of the bankrupt, except leasehold hereditaments and shares (not being fully paid-up shares) in any company or undertaking, and other particulars of an onerous nature shall vest, and that, as to the said excepted portions of the property of the bankrupt, the same shall vest in the bankrupt for all his estate and interest therein upon such terms and subject to such conditions as in the judgment of the said Court shall best be calculated to give effect to the provisions of these presents.

Property, if vested by order, to be held on trusts, &c. of deed of arrangement.

4. If the Court shall make such order vesting the property of the bankrupt wholly or in part in accordance with such request as hereinbefore is mentioned, the whole or such part of the property of the bankrupt as shall be provided for by such order shall, as the case may require, be held by the trustee and the bankrupt, or one or other of them, or otherwise as the case may require, upon the trusts and with, under and subject to the powers, provisoes, agreements, and declarations hereinafter declared and contained concerning the same respectively.

XX. Arrangement under Sect. 23 of Bankruptcy Act, 1883.

5. If and so far as the said Court shall not make such order as aforesaid, then with all convenient speed after the date of the annulment of the bankruptcy the bankrupt and all other necessary parties shall, upon the demand of the trustee, and to his satisfaction, execute and do all such assurances and things as may be necessary or proper for vesting the property of the bankrupt, except leasehold hereditaments and shares (not being fully paid-up shares), in any company or undertaking and other particulars of an onerous nature, in the trustee, and the said excepted portions of the property in the bankrupt, to be held in either case upon the trusts and with, under and subject to the powers, provisions, agreements and declarations hereinafter declared and contained concerning the same respectively.

Property, if not vested by order, to be conveyed to trusts of deed of arrangement.

6. The bankrupt, upon the demand of the trustee, shall pay all costs, charges and expenses incurred or to be incurred in or relating to the suspension of payment of the bankrupt, and the investigation and adjustment of his accounts and transactions, including the costs of, and incident to, the proceedings under the said adjudication, and preliminary and incident thereto, and the annulling thereof, in case the same shall be annulled, and of and incident to these presents, and all assurances to be made under the provisions of these presents, and the carrying the same respectively into effect.

Costs to be paid by bankrupt on demand of trustee.

7. The bankrupt shall, on or before the ——— day of ——— next, pay to each of his creditors, in full, all debts which would be payable in priority to other debts if the distribution of the property of the bankrupt had been administered in the bankruptcy. The bankrupt shall pay to each of his creditors who would have been entitled to receive dividends under the said adjudication, if the proceedings in the said bankruptcy had proceeded, such a sum of money, or coupon dividend, as shall be equal to the amount of ——— shillings in the pound upon the whole debt of such creditors respectively proved or provable in the bankruptcy, by four equal instalments, payable respectively at three, six, nine and twelve months, from the said ——— day of ———, 18—, and also shall forthwith, after the approval of the Court shall have been testified as aforesaid, make and deliver to the trustee, in trust to be by him delivered to the creditors respectively entitled thereto, the promissory notes of the bankrupt, made payable to, or to the order of, such respective creditors in sets

As to debts entitled to priority of payment.

Composition of 10*s.* in the pound to be paid by instalments secured by promissory notes of the bankrupt.

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of four notes each, the notes of each set corresponding respectively in point of amount and time of payment to and securing the said instalments respectively for such sums as shall amount in the aggregate to the sum of ——— shillings in the pound upon such debts.

Declaration of trusts of bankrupt's property;

8. From and after the approval of the Court shall have been so testified as aforesaid, and until and after the annulment of the bankruptcy, if the same shall be annulled, the property of the bankrupt (except leasehold hereditaments and shares, not being fully paid-up shares, in any company or undertaking, and other particulars of an onerous nature) shall

to permit bankrupt to continue trade and manage his affairs until default;

be held by the trustee upon trust, unless and until default shall be made by the bankrupt in the performance and observance of all or any of the several herein contained agreements by him, and conditions on his part to be performed or observed, or any part or parts of such covenants and conditions respectively, to permit him (subject, nevertheless, to the provisions hereinafter contained) to continue his trade and manage his property, and to receive the profits thereof and

to convey property to bankrupt upon fulfilment of terms of arrangement;

the income arising therefrom: And, upon further trust, after the full performance and observance of all and every the several herein contained agreements by the bankrupt, and conditions on his part to be performed or observed (or any part or parts of such agreements or conditions respectively) to assure, at the request and cost of the bankrupt, his heirs, executors, administrators, or assigns, the said premises, to which the present declaration of trust refers, to the bankrupt, his heirs, executors, administrators, or assigns, or as he or they shall direct, subject to the several charges or incumbrances now affecting the same respectively, or such of them as shall for the time being be subsisting or capable of taking

but upon default, to take possession of and sell the bankrupt's property;

effect; But upon further trust, if and so soon as default shall be made by the bankrupt in the performance or observance of all or any of the several herein contained agreements by him, or conditions on his part to be performed or observed, or any part or parts of such agreements or conditions respectively, then and at such times and in such manner as the trustee shall think fit, to obtain possession of, sell, and convert into money, the said premises to which the present declaration of trust refers, with power to sell, either by public auction or private contract, or otherwise (including in the case of sales of any policies of assurance surrenders to

the offices by which the same have respectively been granted), in such manner and upon such terms and subject to such special or other stipulations as the trustee shall think fit, and with power to buy in the said premises, or any part thereof, at any sale by auction, or to rescind or vary any contract for sale, and afterwards sell in manner aforesaid, without being answerable for loss, and for the purposes aforesaid to execute and do all such assurances and things as he shall think fit; and out of the money which shall come to his hands under the trusts of these presents, and also out of the moneys to be received by him from or on behalf of any person or persons to whom (after default shall have been made by the bankrupt in the performance or observance of some one or more of the herein contained agreements and conditions on his part to be performed or observed, or in the performance or observance of some part or parts of such agreements or conditions respectively,) such parts of the property of the bankrupt as consist of leasehold hereditaments or shares in any company or undertaking, or other particulars of an onerous nature, may be assured under the 11th clause hereof, to pay and retain such of the costs, charges and expenses in the 5th clause hereof agreed to be paid, in respect whereof default shall have been made in the payment thereof in pursuance of such agreement, and to apply and administer the surplus of the said moneys for the benefit of the creditors of the bankrupt as if the bankruptcy had proceeded, and to pay the surplus (if any) to the bankrupt.

and to apply the proceeds after payment of costs for the benefit of the creditors.

9. Upon any sale purporting to be made by the trustee under the provisions in that behalf hereinbefore contained, the purchaser or purchasers shall not be bound to see or inquire whether the trusts hereinbefore contained have in fact come into operation, or as to the necessity or expediency of the stipulations subject to which such sale shall have been made, or otherwise as to the propriety or regularity of such sale, and notwithstanding any impropriety or irregularity whatsoever in any such sale, the same shall, as far as regards the safety and protection of the purchaser or purchasers, be deemed to be within the aforesaid trusts in that behalf, and be valid and effectual accordingly, and the remedy of the bankrupt, his heirs, executors, administrators or assigns, in respect of any

Purchasers not to be concerned to inquire as to propriety of sales.

XX. Arrangement under Sect. 23 of Bankruptcy Act, 1883.

impropriety or irregularity in any such sale shall be in damages only.

Powers for trustee, on default of bankrupt, to deal with the property;

10. If and so soon as default shall be made by the bankrupt in the performance or observance of all or any of the several herein contained agreements by him or conditions on his part to be performed or observed, or any part or parts of such covenants or conditions respectively, the trustee may, until the said premises to which the aforesaid declaration of trust refers shall be sold and converted into money under the trusts of these presents, deal with the same as he shall think most beneficial to the interests of the said creditors: And the trustee shall deposit all moneys, cheques, bills of exchange, notes of hand, and securities for money which shall come to his hands under the trusts of these presents in his name at the Bank of ——— or with such other bankers as the committee of inspection shall direct.

to pay moneys into a bank.

As to dealings with leaseholds and onerous property.

11. The bankrupt, and every person having or claiming any estate or interest in any leasehold hereditaments or shares, not being fully paid-up shares, in any company or undertaking, or other particulars of an onerous nature belonging to the bankrupt shall at all times, at the expense of the trust estate, execute and do all such assurances and things for assuring, surrendering or otherwise dealing with the said leasehold hereditaments and shares, and other particulars or any part thereof respectively, as the committee of inspection shall think most beneficial to the interests of the said creditors.

Bankrupt to conduct his business until default under control of trustee;

12. If and so long as the bankrupt shall, under the arrangement hereby entered into, be permitted to continue his trade and to manage his property, and to receive the rents and profits thereof, and the income arising therefrom, he shall carry on the said trade and manage and generally deal with his property, credits and effects, and the rents and profits thereof and the income arising therefrom, in such manner as the committee of inspection shall direct; And shall deposit all moneys, cheques, bills of exchange, notes of hand, and securities for money which he shall receive in the course of such trade at the bank aforesaid, or with such other bankers as the committee of inspection shall direct, in the name of the trustee, or otherwise as the committee of inspection shall direct; And the bankrupt shall, in relation to the premises, keep proper books of account, wherein shall be recorded proper entries of all receipts and disbursements and other

to pay moneys received into bank;

to keep proper accounts;

things necessary to show the true state and condition of his accounts, and of all his proceedings relating to the said property credits effects and affairs; And shall, upon matters and questions involving doubt, or requiring the exercise of discretion, apply for and act upon the advice of the committee of inspection, and shall at all times and in all respects attend to and act upon such directions or suggestions as the committee of inspection shall from time to time or at any time give in relation to the said trade or affairs, or his property, credits, or effects.

to follow the trustee's directions.

13. The moneys which by reason of any assurance made before default shall have been made by the bankrupt in the performance or observance of some or one of the herein contained agreements by him, and conditions on his part to be performed or observed, or in the performance or observance of some part or parts of such agreements or agreement, conditions or condition, under the agreement on the part of the bankrupt hereinbefore contained, or which by reason of the deposits in the name of the trustee or otherwise under the 12th clause hereof shall from time to time come to the hands of the trustee, or be standing to his credit, or be otherwise under his control, shall be taken as money paid by the bankrupt, and received by the trustee in or towards satisfaction of the payments hereinbefore agreed to be made by the bankrupt, and shall be applied by the trustee in or towards satisfaction of such payments accordingly, in the following order (that is to say): First, in or towards payment of the costs, charges, and expenses in the 5th clause hereof agreed to be paid; secondly, in or towards payment in full of all debts which would be payable in priority to the other debts of the bankrupt if the distribution of his property were being administered in the bankruptcy; thirdly, in or towards payment of the composition dividend in the 6th clause hereof agreed to be paid by such instalments as are therein referred to; And the surplus (if any) shall be retained by the trustee as part of the bankrupt's estate for the general purposes of the arrangement by these presents entered into.

Declaration of trusts of moneys received by trustee;

first, in payment of costs;

secondly, in payment of preferential debts;

thirdly, in payment of composition;

surplus to be retained by trustee.

14. These presents shall have no operation or effect unless and until this scheme of arrangement shall have been approved by the Court, and if at any time after such approval the said arrangement shall be annulled, &c. [*ut ante*, p. 556].

Avoidance of deed if scheme of arrangement is not approved by Court or if it is annulled.

In witness, &c.

CONDITIONS OF SALE.

PRELIMINARY DISSERTATION.

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1. Of Particulars and Conditions of Sale generally.

Rights of a purchaser under an open contract.

Under an open contract for sale of land or any other property the purchaser is entitled to assume that the vendor is offering for sale the entire fee simple or other absolute interest, free from incumbrances of every kind (except such charges as are under the custom of the locality or by general law known to be invariably incident thereto), in the whole of the subject-matter of the sale; and he is also entitled as of right, upon the sale, to a complete and perfect title according to law (*a*), proved throughout by satisfac-

(*a*) The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41) has introduced some important changes in the law in this respect: see *post*, p. 633 *seq.*

Of Particulars and Conditions of Sale generally.

tory evidence. If a vendor desires to curtail the rights of the purchaser, either as regards the subject-matter of the sale, or in respect of the title thereto, it is necessary that the limitations should be definite, clearly expressed, and adequately presented to the mind of the purchaser.

Particulars and conditions of sale.

In cases of sales by private treaty these objects are attained by means of agreements for sale (as to which see Vol. I., *ante*, tit. AGREEMENTS), but in the case of sales by auction it is usual to circulate printed particulars and conditions of sale: and it is extremely desirable that this should be invariably done. The function of the particulars is to describe the subject-matter of the sale; while the conditions explain the regulations of the sale, the nature and extent of the title which the purchaser is to accept, and the rights and duties of the parties in respect of the conduct and completion of the purchase.

Restrictive particulars and conditions must be explicit.

Great care is necessary in the preparation of particulars and conditions of sale, for if it be intended to exclude a purchaser from any rights to which he would otherwise be entitled, the intention must be expressed in clear and explicit language: *Symons* v. *James*, 1 Y. & C. C. C. 490; that is to say, in language which can be understood and adequately appreciated by the mind not of a trained practitioner, but of the person who is unlearned so far as regards technical knowledge: *Pope* v. *Sharland*, 4 Y. & C., Ex. 394; *Smith* v. *Watts*, 4 Drew. 338; *Re Banister*, *Broad* v. *Banister*, 12 Ch. D. 131. And when the particulars or conditions of sale contain expressions which are obscure, or are so framed as to be indefinite or ambiguous, they will, as a rule, be construed in favour of the purchaser, or at all events strictly against the vendor: *Taylor* v. *Martindale*, 1 Y. & C. C. C. 661; *Greaves* v. *Wilson*, 25 Beav. 290; *Jackson* v. *Whitehead*, 28 Beav. 154; *Swaisland* v. *Dearsley*, 29 Beav. 430; *Dimmock* v. *Hallett*, L. R., 2 Ch. A. 28.

As to variation of terms of contract.

The particulars and conditions of sale are in fact integral portions of a written contract, and cannot

Of Particulars and Conditions of Sale generally.

be varied or explained by parol matter. Thus, statements of the vendor or his agent at the time of the sale are inadmissible to vary them: *Jenkinson* v. *Pepys*, cit. 6 Ves. 330; *Gunnis* v. *Erhart*, 1 H. Bl. 289; *Bradshaw* v. *Bennett*, 5 C. & P. 48; and that even though the purchaser has signed an agreement that he will "abide by the conditions and declarations made at the sale:" *Higginson* v. *Clowes*, 15 Ves. 516; *S. C.* affirmed, 1 V. & B. 524. Nor will the reading a lease in the auction room cure a mis-statement of its contents in the particulars: *Jones* v. *Edney*, 3 Camp. 285; *Flight* v. *Booth*, 1 Bing. N. C. 379. The rule applies equally to a sub-sale: *Shelton* v. *Livins*, 2 Cr. & J. 411. If it is found necessary to make any alterations in the particulars or conditions after they have been printed, either a second edition should be issued, as in *Goddard* v. *Jeffreys*, 46 L. T. 904; 30 W. R. 269, or the amendments should be made in writing, and the auctioneer should not only call attention at the sale to the alterations that have been made, but should also require the purchaser to sign his contract upon an altered copy: see *Manser* v. *Back*, 6 Hare, at p. 446. In that case the auctioneer read and sold by an altered copy of the particulars, but without calling attention to the alterations, and the contract was also, through inadvertence, signed upon an unaltered copy: it was held that the purchaser could not compel specific performance upon the terms embodied in the original particulars and conditions. The Court will not enforce specific performance of, and will frequently relieve against, a contract where from fraud, surprise or mistake, injustice would be done by enforcing it; and where these exist parol evidence may be admissible (*b*).

(*b*) The question of the admissibility of parol evidence in explanation or variation of written contracts, will be found discussed at length *ante*, Vol. I., tit. AGREEMENTS, pp. 344 *et seq.*

2. As to the Preparation of Particulars of Sale.

Description of property in particulars.

The particulars should describe the property with accuracy and minuteness; they are, in truth, like a description in a policy of assurance, where the buyer knows nothing but what the seller communicates: Sugd. Vend. 23. "It is the obvious duty of a vendor to make himself fully acquainted with all the peculiarities and incidents of the property which he is going to sell, and when he describes the property for the information of the purchaser it is his duty to describe everything which it is material to know, in order to judge of the nature and value of the property. It is not for him just to tell what is not actually untrue, leaving out a great deal that is true, and leaving it to the purchaser to inquire whether there is any error or omission in the description or not." Per *Kindersley*, V.-C., in *Brandling* v. *Plummer*, 2 Drew. at p. 430. So in the older case of *Calverley* v. *Williams*, 1 Ves. jun. at p. 213, Lord *Thurlow*, C., lays down the rule that "if a person, however unconversant of the actual situation of his estate, will give a description, he must be bound by that, whether conusant of it or not." The description must be made with perfect truth and the fullest disclosure, and if it fails in these respects the vendor will not be entitled to enforce specific performance against a purchaser who has been misled: see *Stewart* v. *Alliston*, 1 Mer. 26; *Trower* v. *Newcombe*, 3 Mer. 704; *Baskcomb* v. *Beckwith*, L. R., 8 Eq. 100; *O'Kill* v. *Whittaker*, 2 Phil. 338; *Phillipson* v. *Gibson*, L. R., 6 Ch. A. 428. The question to be asked in reference to any statement in a particular is thus put by *Jessel*, M. R.: "Is this a fair particular? Is it one in which a purchaser is told what he has to buy, so as to enable him to form an idea of the value of the thing to be purchased?" *Jones* v. *Rimmer*, 14 Ch. D. 588, 591.

Particulars not corrected by conditions.

The proper office of the particulars is to describe the subject-matter of the contract, and that of the conditions to state the terms on which it is sold. Per *Malins*, V.-C., in *Torrance* v. *Bolton*, L. R., 14 Eq.

Preparation of Particulars.

at p. 130; *S. C.*, affirmed on appeal, L. R., 8 Ch. 118. Hence in that case it was held that a misdescription in the particulars could not be taken to be corrected by a more accurate statement contained in the conditions.

Particulars must accurately describe the nature of the property.

It is, therefore, necessary that the particulars should state with precision every limitation of the absolute interest to which the property offered for sale is subject. The particulars must not in any way misdescribe the tenure or the nature of the property; they must contain an exact description of the extent and qualifications of the interest or estate sold. Every incumbrance and permanent charge (except such as are practically invariable incidents of the property, see *infra*, p. 615) affecting the property, a release of which the vendor is not in a position to furnish; every right of third parties, whether by way of easement (see, however, p. 614), restrictive covenant, adverse possession, or power to determine the interest in question, must be accurately stated. Any facts as to claims upon the property by third parties, or as to any expense or burden which may be imposed upon the purchaser, must be set forth. So also the exact facts with regard to leases and leasehold interests must be stated. The nature of a lease, whether original or derivative, and whether other property is held under it, should appear on the face of the particulars: and if any reference be made to the covenants in a lease, such reference must be strictly accurate, and in no way misleading. Again, no misdescription or misrepresentation must be permitted as to the dimensions, area or quantity, or in respect of any peculiar advantage of the property; nor must any untrue statement be made as to its value. If the state of the property as regards repairs and dilapidations be referred to, the reference must be strictly true in every respect. And of course there must be no deliberate false statement or representation made on any point in any way material to the value or desirability of the property. In short, everything must be stated which is reasonably of weight in enabling the pur-

chaser to understand the precise nature and condition of the property he is about to bid for, and to make a fair estimate of its value. Preparation of Particulars.

The errors into which vendors have fallen in failing to give proper and accurate descriptions of their property are numerous; and in the following pages it is proposed to deal briefly with the circumstances under which fraud, misrepresentation or misdescription will enable the purchaser to avoid the contract or obtain compensation.

As to Misrepresentation generally.]—Fraud will vitiate any contract into which it enters, so far at least as to render such contract voidable: *Oakes* v. *Turquand*, L. R., 2 H. L. 325; and it frequently happens that, even in the absence of actual and intentional fraud, mistakes are made in the description of the subject-matter of a contract, or in the statement of its conditions, of so serious a character that equity and even law will treat them as being equivalent to fraud. In the case of actual fraud the Courts of Law used to require clearer evidence before taking action than was necessary in a Court of Equity; *Chesterfield* v. *Jansen*, 1 Wh. & Tud. L. C. 541, and the cases there cited; but, speaking generally, misdescription and actual fraud or misrepresentation are, for the purpose of avoiding a contract, upon the same footing. In equity it was always held that a mistake due to carelessness was sufficiently akin to fraud to justify the Court in dealing with it as such; and at law (*c*) it was held that an error or mis-statement in respect of a material matter, though not actually fraudulent, will avoid the contract: *Flight* v. *Booth*, 1 Bing. N. C. 379. Misrepresentation generally.

In order that a false or inaccurate statement may be available as a misrepresentation to disturb a contract, it is necessary that it should have been made Misrepresentation must be material.

(*c*) The Courts of Law did not adopt this doctrine without some hesitation. See *Wright* v. *Wilson*, 1 Moo. & R. 207; *Mills* v. *Oddy*, 6 C. & P. 728.

Of Misrepresentation.

respecting a matter in respect of which the purchaser was entitled to rest his confidence in the vendor; see *Fox* v. *Macreth*, 1 Wh. & Tud. L. C. 115; that it should have been made in respect of some material fact which had weight in inducing the purchaser to enter into the contract, or, as it is sometimes put, it must have been a representation *dans locum contractui; Flight* v. *Booth*, 1 Bing. N. C. 370, 377; *Reynell* v. *Sprye*, 1 De G., M. & G. 660; that the person making it should not have known that it was true; *Pulsford* v. *Richards*, 17 Beav. 96; *National Exchange Co.* v. *Drew*, 2 Macq. H. L. 103; and that injury should have followed, for the Courts do not administer a merely ethical jurisdiction: *Fellowes* v. *Gwydyr*, 1 Russ. & M. 83; *Slim* v. *Croucher*, 1 De G., F. & J. 518. It is important to mark that fraudulent intent, or actual conscious false statement, are by no means essential: for it is not enough for those who have the framing of particulars and conditions to avoid making statements which they know to be untrue; they must also be careful to assert or imply nothing except that which they know to be true. The rule is thus laid down by *Cairns*, L. C., in the case of *The Reese River Silver Mining Co.* v. *Smith*, L. R., 4 H. L. at p. 79: "I apprehend it to be the rule of law that if persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue." In *Burrowes* v. *Lock*, 10 Ves. 476, it is said that "in cases of this kind it will be sufficient to show, 1st, that the fact as represented is false; 2ndly, that the person making it had knowledge of a fact contrary to it." This statement of the law is quoted with approval by Lord *St. Leonards*, Sug. Vend. 4; but it goes hardly as far as the passage above given from a judgment of Lord *Cairns*, or as the following words from a judgment of Lord *Mansfield*, who says: "It signifies nothing whether a man represents a thing to be different from what he knows it to be, or whether he makes a representation which he does not at the time know to be true

Fraudulent intent not necessary.

or false, if in point of fact it turns out to be false: " *Schneider* v. *Heath*, 3 Camp. 506. See also *Ainsley* v. *Medlycott*, 9 Ves. 21; *Price* v. *Macaulay*, 2 De G., M. & G. 339; *Lake* v. *Brutton*, 8 De G., M. & G. 440; *Higgins* v. *Samels*, 2 J. & H. 460; *Strangways* v. *Bishop*, 29 L. T. 120; *Wilde* v. *Gibson*, 1 H. L. C. 633; *Watson* v. *Poulson*, 15 Jur. 1111; *Adamson* v. *Jarvis*, 4 Bing. 66; *Nash* v. *Wooderson*, 33 W. R. 301. **Of Misrepresentation.**

It is also necessary that the purchaser should have been misled by reason of his having placed his confidence in the vendor and accepted his statement. But if a purchaser, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him or to his agents, he cannot be heard to say he was deceived by the vendor's representations, the rule being *caveat emptor*, and the knowledge of his agents being as binding on him as his own knowledge: *Attwood* v. *Small*, 6 Cl. & F. 232. See also *Jennings* v. *Broughton*, 17 Beav. 234; 5 De G., M. & G. 126; *Higgins* v. *Samels*, 2 J. & H. 460; *Clarke* v. *Macintosh*, 4 Giff. 134; *Morley* v. *Clavering*, 29 Beav. 84. The test is whether or not the purchaser has chosen to make his own estimate of the state of the case: *Clapham* v. *Shillito*, 7 Beav. 146; and it must be noticed that the word "knowledge," as used above, means acquaintance with the particular facts of the particular case, not scientific or technical knowledge of the subject generally; for where a purchaser of mines examined them himself, he was not afterwards allowed to set up his ignorance of mining affairs as a reason for avoiding his contract: *Haywood* v. *Cope*, 25 Beav. 140. Purchaser must have been misled.

But, notwithstanding the rule laid down in *Attwood* v. *Small*, 6 Cl. & F. 232, *supra*, it is not enough, in these cases, to show that the purchaser had the means of knowledge, and might have ascertained the truth if he had been reasonably diligent; *Redgrave* v. *Hurd*, 20 Ch. D. 1; for the vendor is not at liberty to make a false representation and then say that the purchaser might have discovered the facts by inquiry; *Martin* v. *Cotter*, 3 Jo. & Lat. 496; nor is it sufficient for a vendor, whose conduct has not been innocent, to say that the purchaser has been

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negligent: *Scott* v. *Hanson*, 1 Sim. 14. And if a purchaser does make inquiry, if it be a cursory and palpably insufficient investigation, it will not relieve the vendor of the consequences of a misrepresentation; the vendor must show either that the purchaser had actual knowledge of a fact proving the representation to be untrue, or that the purchaser did not in fact rely upon the representation: *Redgrave* v. *Hurd*, 20 Ch. D. 1; *Smith* v. *Land and House Property Corporation*, 28 Ch. D. 7. See also *Dobell* v. *Stevens*, 3 B. & C. 623, and Lord *St. Leonards*' observation on the case, Sug. V. & P. 209. And see *Phelps* v. *White*, 7 L. R., Ir. 160.

As to purchaser affected with notice.

Similarly, though notice of a lease is notice of its contents, so that a purchaser who is aware of the existence of a lease, and has proper opportunity afforded him of examining it (see *Brumfit* v. *Morton*, 3 Jur., N. S. 1198), will be fixed with notice of all covenants contained in it, yet if it be shown that he did not actually see the lease, but trusted to the vendor's account of its contents (*Flight* v. *Barton*, 3 My. & K. 282; *Caballero* v. *Henty*, L. R., 9 Ch. A. 447), and that the representations of the vendor were such as to amount to a fraud (*Jones* v. *Edney*, 3 Camp. 285), the purchaser may be relieved. And when the purchaser, though making inquiries, is nevertheless misled, he may avail himself of the falsity of the representation; as when he is referred to persons who give him untrue information; *Lysney* v. *Selby*, Ld. Raym. 1118; *Dobell* v. *Stevens*, 3 B. & C. 623; *Wilson* v. *Fuller*, 3 Q. B. 68; or when the representation was in respect of a matter which could not by the exercise of reasonable diligence and ordinary observation have been discovered: *Denny* v. *Hancock*, L. R., 6 Ch. A. 1.

As to purchaser with knowledge of the facts.

But if, when it can reasonably be held that the purchaser was affected with notice of the true state of the case, the Court will not allow him to take advantage of the mis-statement of his vendor, *à fortiori* it will not when it can be shown that he had actual knowledge with regard thereto. For instance, where a purchaser bought land under particulars which stated that it was over "a fine vein of anthracite coal," a statement which was, to the purchaser's

knowledge, contrary to the fact, he was held to his bargain: *Colby* v. *Gadsden*, 34 Beav. 416. Again, where a purchaser of leaseholds, who had been released from his contract on the ground of a misrepresentation of the rents, bought a second time under the same representation, he was refused relief: *Campbell* v. *Hay*, 2 Molloy, 102. See also *Dyer* v. *Hargrave*, 10 Ves. 505; *Cowley* v. *Watts*, 17 Jur. 172; *Cox* v. *Middleton*, 2 Drew. 217. Of Misrepresentation.

This rule as to the purchaser's acquaintance with the facts does not apply to matters of title; for it has been held that if a vendor enters into a contract to make a good title, the purchaser can insist upon his doing so, even though the purchaser was all along aware of the vendor's inability: *Cato* v. *Thompson*, 9 Q. B. D. 616; *In re Gloag and Miller's Contract*, 23 Ch. D. 320. As to matters of title.

It is not, however, every puffing statement or expression of commendation which amounts to a misrepresentation: for *simplex commendatio non obligat.* In *Pope* v. *Garland*, 4 Y & C. Ex. 401. *Alderson*, B., said that "if there is a misrepresentation so that the acuteness and industry of the purchaser is set to sleep, and he is induced to believe the contrary of what is the real state of the case, the vendor is in such case bound by such representation;" and in *Price* v. *Macaulay*, 2 De G., M. & G. 344, *Knight Bruce*, L. J., said, "By wilful misrepresentations I mean representations made with a view to enhance the value." See also *Hart* v. *Swaine*, 7 Ch. D. 42. But though the maxim *caveat emptor* does not apply to cases where the representation is of a material fact, and also false, *Lowndes* v. *Cox*, 2 Cox, 363, it does apply where the statement merely amounts to an expression of an opinion, a representation which is vague and indefinite, the effect of which should be to put the purchaser upon inquiry: *Trower* v. *Newcome*, 3 Mer. 704. In *Leyland* v. *Illingworth*, 2 De G., F. & J. 248, the particulars of sale of a factory described the property as being "well supplied with water:" it appeared that a supply of water was obtainable only from neighbouring waterworks, Puffing statements.

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and on payment of a rate; other manufacturing establishments in the district, some of which were on a higher level than the property in question, were proved to be supplied with water from wells upon the properties themselves; it was also stated in evidence that the expression "well supplied with water," was locally a well-understood mode of describing premises having independent water supply: it was held that there had been a misdescription of fact, and that the purchaser, who had purchased on the faith of the description, and without knowing the real state of the property, was entitled to compensation, or to be discharged from his contract.

Instances of misrepresentation not entitling a purchaser to relief.

Statements and descriptions such as the following have been held not to entitle a purchaser to be relieved from his bargain: that leaseholds renewable on payment of a substantial fine were "nearly equal to freeholds," and were renewable on payment of a "small fine;" *Fenton* v. *Brown*, 14 Ves. 144; that land in fact imperfectly watered was "rich meadow land;" *Scott* v. *Hanson*, 1 Sim. 13; that a house of a very inferior description was "a desirable residence for a family of distinction;" *Magennis* v. *Fallon*; 2 Moll. 587; that a house which was out of repair, some of the walls of which were only half-a-brick in thickness, and which had cracks in its walls and a defect in a gable; some of the rooms being small and without fireplaces, was a "substantial and convenient house;" *Johnson* v. *Smart*, 2 Giff. 151; that the avoidance of an advowson was "likely to occur soon," the actual incumbent being thirty-two years of age, but having expectations of being presented to another living, when it should become vacant on the death of a much older incumbent: *Trower* v. *Newcome*, 3 Mer. 704. All these are cases where the purchaser accepted the opinion of the vendor as to the advantages of the property. So also a purchaser will not be entitled to relief because the vendor states the property to be of a specified value, which turns out to be grossly exaggerated, for value is merely a matter of estimation, with regard to which there may well be difference of opinion: *Harvey* v. *Young*, Yelv. 20; *Leakins*

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v. *Clissell*, 1 Sid. 146; *S. C.*, *sub nom. Ekins* v. *Tresham*, 1 Leo. 102; *Duckinfield* v. *Whichcott*, 2 Ch. Ca. 204; nor because the vendor states that a third party has offered a specified sum for the property: Sugd. V. & P. 2; Roll. Abr. tit. *Action sur Case*, 101, pl. 16.

Statements for which vendor held liable.

The following are cases of statements of fact made by the vendor which turned out to be false, and for which he was held responsible. An untrue statement, though made in ignorance, that a house was not "damp," was held to be fatal in equity: *Strangways* v. *Bishop*, 29 L. T. 120. A description of the grantor of an annuity, who was actually in prison for debt, as "a person of independent means," was held to be insufficient to sustain an action for deceit; *Dawes* v. *King*, 1 Stark. 75; but it would probably be sufficient ground for avoiding a contract: see *Smith* v. *Land and House Property Corporation*, 28 Ch. D. 7. Where a quarry of inferior limestone was described as "fit for the London market," an expression shown to be restricted in the trade to limestone of the best quality, it was held that the misdescription was such as to bar an action for specific performance: *Higgins* v. *Samels*, 2 J. & H. 460. In the course of the judgment, *Page Wood*, V.-C., said: "This is a contract which comes very close upon the boundary that divides cases where the Court grants specific performance, and where it holds its hand on the ground of misrepresentation." The proved custom of the trade would seem to be the only ground of distinction which can be drawn between the misrepresentation in this case and in such cases as that of *Scott* v. *Hanson*, *supra*. See also *Leyland* v. *Illingworth*, stated *ante*, p. 591. A false statement that a surveyor has valued the property at a specified sum will be ground for disturbing a contract: *Buxton* v. *Lister*, 3 Atk. 386; *Small* v. *Attwood*, 6 Cl. & F. 233; *Partridge* v. *Usborne*, 5 Russ. 195; *Lord Brooke* v. *Rounthwaite*, 5 Ha. 298; *Pike* v. *Vigors*, 2 Dru. & W. 1, 150; and see *Powell* v. *Edmunds*, 12 East, 11.

Conditions as to misdescription.

It is not easy to guard against misdescriptions and errors in measurements, quantities, and the like, and it is customary to make use of conditions of sale

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for the purpose of preventing the contract from being avoided by reason of any mistake which is innocent and of small importance. These conditions usually provide either that compensation shall be allowed or that it shall not be allowed. Conditions of this class will not be available, as a rule, in cases where the errors are of large amount, or where the misdescription is marked by fraud: *vide infra*, p. 700 *et seq.*

Where made.

Misdescriptions usually occur in the particulars of sale and in the conditions; but it sometimes happens that the plans often annexed to particulars of sale of large estates are made the vehicle for misleading statements; see *Weston* v. *Bird*, 2 W. R. 145; *Beaumont* v. *Dukes*, Jac. 422; *Denny* v. *Hancock*, L. R., 6 Ch. 1; *Baskcomb* v. *Beckwith*, L. R., 8 Eq. 100; and *infra*, p. 627; and still more frequently declarations and statements made by the vendor or his agents to or in the hearing of the purchaser are relied upon.

Misrepresentation by implication,

Misrepresentations of fact may be made by implication, or by a statement which contains only part of the truth; or a statement may be so framed as to carry a wrong impression: *Walker* v. *Symonds*, 3 Swan. 73; *Torrance* v. *Bolton*, L. R., 8 Ch. A. 118. Again, a vendor may be guilty of misrepresentation by concealing a material fact which ought to have been disclosed: *Shirley* v. *Stratton*, 1 Bro. C. C. 440; *Attwood* v. *Small*, 6 Cl. & F. 232; *Fuller* v. *Wilson*, 3 Q. B. 58; *Mellish* v. *Motteaux*, 1 Peake, N. P. C. 156; *Martin* v. *Morgan*, 1 Brod. & B. 289; *Lucas* v. *James*, 7 Ha. 410; *Smith* v. *Ellis*, 14 Jur. 682; *Cruse* v. *Newell*, 2 Jur., N. S. 536; *Tildersley* v. *Clarkson*, 30 Beav. 419; *Mathias* v. *Yetts*, 46 L. T. 497. The non-disclosure of a fact which the vendor was not bound to disclose will not be material: *Abbott* v. *Sworder*, 4 De G. & S. 448; *Haywood* v. *Cope*, 25 Beav. 140 (*d*). In some cases, also, mere silence

and by mere silence.

(*d*) At law, where a sale was "with all faults," non-disclosure was not fatal, unless there was in addition some circumstance of fraud: *Baglehole* v. *Walters*, 3 Camp. 156; *Early* v. *Garrett*, 9 B. & C. 929; *Taylor* v. *Bullen*, 5 Exch. 779.

will be as fatal as the most direct statement could be; as in the case of *Flight* v. *Barton*, 3 My. & K. 282, where the purchaser told the vendor that he was buying for a particular purpose, and the vendor was thereupon silent with respect to a restrictive covenant which would prevent the use of the property in the mode intended. See also *Hill* v. *Gray*, 1 Stark. 454; *Keates* v. *Cadogan*, 10 C. B. 591. But in such cases the mere silence of the vendor will not prejudice him if the purchaser himself examines the deed containing the covenant: *Morley* v. *Clavering*, 29 Beav. 84. Of Misrepresentation.

In one case, *Smith* v. *Hughes*, L. R., 6 Q. B. 607, where by no fault of the vendor the purchaser fell into the mistake of supposing that oats offered him for sale were old, whereas they were new, and the vendor merely allowed him to remain in that error, it was held that the vendor, not having been responsible for the purchaser's original mistake, was not bound to put him right, and was therefore entitled to enforce the contract. It seems probable, however, that had the case been before a Court of Equity the decision would have been otherwise.

A vendor may also so act as to be guilty of misrepresentation without making any statements; as, for instance, in the case cited by *Gibbs*, C. J., in *Pickering* v. *Dowson*, 4 Taun. 766, at p. 785, where a vendor, before selling a house, purposely concealed with plaster and paper a defect in the wall. See also *Baglehole* v. *Walters*, 3 Camp. 156; *Schneider* v. *Heath*, 3 Camp. 306; *Tildesley* v. *Clarkson*, 30 Beav. 419; *Oxford* v. *Provand*, L. R., 2 P. C. 141. Misrepresentation by conduct.

There are of course some things which a vendor is entitled to keep undisclosed. Thus, he is justified in requiring a purchaser, who has all the facts before him, to form his own judgment of the value of the property, and need not disclose the fact that a recent valuation fixed the value at a lower sum than that given for it by the purchaser; *Abbott* v. *Sworder*, 4 De G. & S. 448; nor need he inform the purchaser that the tenant has complained of the rent as being too heavy: *Haywood* v. *Cope*, 25 Beav. 140. Nor is a vendor liable for misrepresentation if he omits to What vendor is not bound to disclose.

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set forth in the particulars of sale patent defects, or such incumbrances as, either by general law or local custom, are incident to the tenure of the property sold. See as to this, *infra*, p. 615 *et seq.*

Misrepresentation by agent of vendor.

A vendor will usually be held responsible for any error or misrepresentation made by his duly authorized agent. A remarkable exception to or departure from this rule is to be found in the case of *Cornfoot* v. *Ffolkes*, 6 M. & W. 358, where a house, the enjoyment of which was materially interfered with by a nuisance well known to the vendor, was offered for sale through an auctioneer who had no knowledge of the matter. At the sale the purchaser inquired if there was anything which would render the house undesirable, and was answered in the negative. The Court held (*diss.* Lord *Abinger*) that the vendor had made no representation, and that the statement made by the auctioneer was not to his knowledge false, and the purchaser was held to his contract. It is to be observed that this decision, which was *at law* upon a plea of fraud, covin and misrepresentation, has been much questioned. See Dart, V. & P. 93; see also *Wilson* v. *Fuller*, 3 Q. B. 68; and in *National Exchange Co.* v. *Drew*, 2 Macq. H. L. 108, at p. 144, Lord *St. Leonards* says, in reference to *Cornfoot* v. *Ffolkes*, *supra*, that, "supposing there had been in that case no allegation of fraud, but it had been put solely upon the ground of misrepresentation, it was not denied in the course of the judgment, as I understand it, that if a principal, with a knowledge of a fact which was material to the value of the property, employed an agent whom he knew to be ignorant of the fact, for the purpose of concealing it, he could not avail himself of that concealment, and that he would be responsible. That, I think, seems to have been admitted in the judgment. But I should take the liberty of going a great deal further. I should say, that if in that case fraud had not been alleged, but it had been put upon misrepresentation, and the fact were that a man, knowing that there is so serious a nuisance affecting a house as to diminish its value, and he takes care himself not to make the contract, but

Cornfoot v. *Ffolkes*.

leaves it to an agent whom he has no reason to suppose is aware of the fact; and if in the course of the treaty for the contract the agent, being asked if such a fact existed, states positively no, and the contract is executed in silence upon the point, because the purchaser or the tenant's vigilance has been lulled to sleep upon it, and he believes the representation which has been made to him by the agent, I say, in such a case, I should be very much shocked at the law of England if I could bring myself to believe that it would not reach the case of a person so availing himself of a misrepresentation of his own agent, who might be ignorant of the fact, although the principal himself knew it, and employed the agent in order to avoid making a direct misrepresentation to the contrary." See also *Ludgater* v. *Love*, 44 L. T. 694. Of Misrepresentation.

The case of *Mullens* v. *Miller*, 22 Ch. D. 194, was the converse of the cases of *Cornfoot* v. *Ffolkes* and *Fuller* v. *Wilson*. There the value of a leasehold house was grossly misrepresented by a surveyor whom the owner had requested to find a purchaser for the property. It was held that the authority of the agent extended to the making of the representation, that the vendor must be taken to be bound by the act of his agent, and that the purchaser could not be compelled specifically to perform the contract. And see *Coleman* v. *Riches*, 3 C. L. R. 795. So also when a vendor makes a misrepresentation to an auctioneer, who repeats it to the purchaser: *Murray* v. *Mann*, 2 Ex. 538; *Stevens* v. *Legh*, 2 C. L. R. 251; *Jones* v. *Edney*, 3 Camp. 284; *Flight* v. *Booth*, 1 Bing. N. C. 370. Similarly, a fraudulent statement made by the vendor, and communicated by the purchaser to a sub-purchaser, gives the latter a ground of action: *Attwood* v. *Small*, 6 Cl. & F. 232; *Gibson* v. *D'Este*, 2 Y. & C. C. C. 542; *S. C.*, *sub nom.* *Wilde* v. *Gibson*, 1 H. L. C. 605. *Mullens* v. *Miller*.

As between himself and the vendor it is not in any way incumbent upon an ordinary purchaser to make any disclosure with respect to the property or its value, though he is bound not to mislead the vendor in any way. Thus, where one party to Purchaser not usually bound to make disclosure to vendor.

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an exchange induced the other to consent to the exchange, by a statement that the tenants would agree, he was not allowed on their refusal to take a decree for specific performance with compensation for their interests: *Clermont* v. *Tasburgh*, 1 Jac. & W. 112. This rule does not apply when there is any fiduciary relationship between the two: as where the vendor's own agent, intending to purchase a house, represented trifling damage done to the property by a flood as having deteriorated it to the extent of 40*l.* or 50*l.*: *Cadman* v. *Horner*, 18 Ves. 10. Whether this is so in the case of a tenant for life purchasing from the trustees of the settlement is not clear. See *Dicconson* v. *Talbot*, L. R., 6 Ch. A. 33, 37. If, however, the purchaser is aware of anything which will increase not the value of the property itself, but the quantum of the vendor's interest therein, he is bound to disclose it to the vendor; nor may he conceal from the vendor any legal right which he knows has accrued to the vendor: *Fox* v. *Macreth*, 2 Bro. C. C. 400; *Turner* v. *Harvey*, Jac. 169; *Davies* v. *Cooper*, 5 My. & Cr. 270; *Ellard* v. *Lord Llandaff*, 1 Ba. & B. 241; *Jones* v. *Keene*, 2 Moo. & R. 348; *Phillips* v. *Homfray*, L. R., 6 Ch. A. 770. Further, a purchaser who, by statements made to third parties, has prevented them from bidding, will not be assisted either in equity or at law: *Howard* v. *Hopkins*, 2 Atk. 371: *Buxton* v. *Lister*, 3 Atk. 383; *Fuller* v. *Abrahams*, 3 Brod. & B. 116; *Mason* v. *Armitage*, 13 Ves. 38.

Slander of title.

And a purchaser or a third party may, if he make statements as to the title which show malice, are false, and result in injury to the vendor, be liable to an action for slander of title: *Brook* v. *Rawl*, 4 Ex. 521. But the action will not lie if the representation was made *bonâ fide*: *Blackham* v. *Pugh*, 2 C. B. 611; *Pitt* v. *Donovan*, 1 Mau. & S. 639; *Wren* v. *Wield*, L. R., 4 Q. B. 730; *Steward* v. *Young*, L. R., 5 C. P. 122.

Third party decreed to make representation good.

When a misrepresentation is made by a third party, he will be decreed, in some cases, to make it good. So, in *Burrowes* v. *Lock*, 10 Ves. 475, where a trustee of a fund, who, upon inquiry by a purchaser, had knowingly given him wrong informa-

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tion, it was held that the trustee was bound to make good the representation.

Fraud renders contract voidable, not void.

A contract induced by fraud is, however, not void, but only voidable. It is, therefore, capable of confirmation by the injured party after the discovery of the fraud; and if a purchaser should, after he has become acquainted with the facts, continue to act in such a way as to confirm the contract, he cannot then be heard to say that the transaction is fraudulent. He must be treated as having condoned the offence: *Drewe* v. *Corp*, 9 Ves. 368; *Hoggart* v. *Scott*, 1 R. & My. 293; *Sneesby* v. *Thorne*, 7 De G., M. & G. 399; *Forrer* v. *Nash*, 35 Beav. 167; *Mortlock* v. *Buller*, 10 Ves. 315; *Dyer* v. *Hargrave*, 10 Ves. 505; *Upperton* v. *Nickolson*, L. R., 6 Ch. A. 436. The confirmation must, however, be clear; and it probably would not suffice unless it were such as to show an intention on the part of the injured party to accept a new contract on the old terms, with notice of the fraud. See Dart, V. & P. 105; *Baugh* v. *Price*, 1 Wils. 320; *De Montmorency* v. *Devereux*, 7 Cl. & F. 225; *Vigers* v. *Pike*, 8 Cl. & F. 645; *Campbell* v. *Fleming*, 1 A. & E. 40. Thus, in the case of *Fordyce* v. *Ford*, 4 Bro. C. C. 494, cit. 13 Ves. 78, where the purchaser, after discovering the variance in the tenure of what he had bought from the description, acted in such a way as to show that he thought the one tenure as good as the other, he was not afterwards allowed to repudiate the contract. So the right to an abatement may be lost by dealing with the estate: *Nelthorpe* v. *Holgate*, 1 Coll. 203; *Lawrenson* v. *Butler*, 1 Sch. & Lef. 13; *Castle* v. *Wilkinson*, L. R., 5 Ch. 534; and if it be intended to take an objection on the ground of the loss of the title deeds, it must be taken without any delay: *Alexander* v. *Crosbie*, 1 J. & Lat. 666. It appears, also, that although an objection based upon a misdescription may be raised at any time, upon its discovery, an objection founded on a flaw in title must be taken within the time (if any) limited for sending in requisitions: *Price* v. *Macaulay*, 2 De G., M. & G. 339.

As to effect of

The question sometimes arises whether, on the sale

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avoidance of contract as to one lot where several lots purchased.

of an estate in lots, a purchaser who has bought more than one lot, and has succeeded in avoiding his contract as to one lot, on the ground of fraud or misrepresentation, can avoid his contract as to the rest. The answer appears to depend not so much on the importance of the lots to the use or enjoyment one of the other, as upon the existence or non-existence of an arrangement between the vendor and purchaser to take all the lots under one contract. Thus, examples of the first case will be found in *Emmerson* v. *Heelis*, 2 Taun. 38; *James* v. *Shore*, 1 Stark. 426; *Baldey* v. *Palmer*, 2 B. &. C. 37; *Roots* v. *Lord Dormer*, 4 B. & Ad. 77; *Seaton* v. *Booth*, 4 A. & E. 528. In these cases the contracts as to the several lots were independent: but in *Dykes* v. *Blake*, 4 Bing. N. C. 463, the two lots were included in one formal contract, and the purchaser was allowed to rescind the contract as to both lots. And see *Prendergast* v. *Eyre*, 2 Hog. 81. In *Chambers* v. *Griffiths*, 1 Esp. 150, the purchaser had intended to use all the lots together, and was allowed to rescind as to all. See also *Gibson* v. *Spurrier*, Peak Ad. C. 49. The decision in *Chambers* v. *Griffiths* has been questioned. See *Casamajor* v. *Strode*, 2 My. & K. 724. When the contracts are separable, and the lots are not dependent upon one another, the purchaser must take what he can get at an abatement: *Poole* v. *Shergold*, 2 Bro. C. C. 118. It may also be noted that the Court will not pry into the motives which lead the purchaser to desire to avoid his contract, but will regard only the question whether he has a right to do so: *Denny* v. *Hancock*, L. R., 6 Ch. A. 1.

Mutual mistake.

Another class of cases in which a contract may be set aside is where it has been founded upon a mistake of both parties. A mutual mistake will avoid the contract both at law and in equity. If one party thinks he has purchased part of an estate, which the other thinks he has not sold, the mistake will be a ground for setting aside the contract. See *Calverley* v. *Williams*, 1 Ves. jun. 210, in which case neither party was under a misapprehension as to what was to be conveyed. But in the case of *Baxendale* v. *Seale*, 19 Beav. 601, where a manor was sold as of

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uncertain boundaries, and it turned out to be very much more extensive than either the vendor or the purchaser thought, the Court refused to allow the purchaser to compel specific performance: compare *Colyer* v. *Clay*, 7 Beav. 118; *Anon.*, cited 6 Ves. 24, and *Knight* v. *Marjoribanks*, 11 Beav. 322; 2 Mac. & G. 10. See also *Bingham* v. *Bingham*, 1 Ves. sen. 126; and see the note in Belt's Supplement, p. 81; and *Jones* v. *Clifford*, 3 Ch. D. 779; in both of which cases the purchaser actually bought his own estate under a misapprehension common to both parties, and his objection to complete was sustained (*e*). *Cooper* v. *Phibbs*, L. R., 2 E. & Ir. Ap. 149, was a case in which a man by mistake took a lease of his own property and was relieved. In *Hitchcock* v. *Giddings*, 4 Price, 135, the reversion upon an estate tail was the subject of sale; both parties were under the impression that it was a subsisting estate, whereas in fact it had been barred at the time of the contract. This was perhaps a strong case, for the purchaser might have discovered the fact had he made proper searches. The principle of this decision has been adversely criticised by Lord *St. Leonards*. See Sugd. V. & P. 247. But it is a well-established rule of law that where a purchaser buys a property which has no existence he can recover his purchase-money as having been paid without consideration. So on the purchase of a life annuity, if the life has dropped before the purchase, the purchaser may recover the purchase-money paid in ignorance of the event: *Strickland* v. *Turner*, 7 Ex. 208. See also *Wycombe Rail. Co.* v. *Donnington Hospital*, L. R., 1 Ch. A. 268; *Earl Beauchamp* v. *Winn*, L. R., 6 H. L. 223. Where the mistake is attributable to the error of the vendor relief may be had: as in *Higginson* v. *Clowes*, 15 Ves. 525, where the purchaser was misled by the ambiguity of the particulars. So where the

(*e*) *Bingham* v. *Bingham* is an authority to the effect that the Court will relieve against common mistake without fraud, even after completion of the purchase and payment of the purchase-money. See Belt's Supplement, p. 79. This decision was expressly approved of by *Hall*, V.-C., in *Jones* v. *Clifford*, at p. 790, though the point did not arise in that case.

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vendor had by his acts innocently and unintentionally contributed to the purchaser's mistake, it was held that specific performance could not be enforced: *Baskcomb* v. *Beckwith*, L. R., 8 Eq. 100. The evidence of the mistake or misrepresentation on which reliance is placed must of course be clear: *Clay* v. *Rufford*, 14 Jur. 803. See *Manser* v. *Back*, 6 Ha. 443; *Turner* v. *Ince*, 5 Jur., N. S. 1072; *Swaisland* v. *Dearsley*, 29 Beav. 430; *Money* v. *Bigwood*, 8 Jur., N. S. 803; *S. C.*, 10 Jur. 597. The Court has relieved the vendor from his obligation to fulfil his part of the contract when it has been shown that the vendor has by reason of a slip or miscalculation sold the estate for a less price than he had really intended to accept: as in *Webster* v. *Cecil*, 30 Beav. 62, where the mistake of the vendor was clearly proved by a paper containing the figures upon which his estimate of price was founded. So also where the wrong directions were given to the auctioneer by the vendor: *Day* v. *Wells*, 30 Beav. 220. And see *Mason* v. *Armitage*, 13 Ves. 25; *Malins* v. *Freeman*, 2 Keen, 25.

Purchaser not relieved when he has been mislead by his own mistake.

But, though common mistake is a ground for avoiding a contract, the case is otherwise where the vendor has been without blame, and the purchaser has only himself to thank for his mistake: *Stapylton* v. *Scott*, 13 Ves. 427. The case of *Morshead* v. *Frederick* (reported in the Appendix to Sugd. V. & P. 8) is to the contrary. In that case the house which was offered for sale was held at two rents, one a small ground rent and the other a considerable improved rent; the purchasers, who were the occupying tenants, omitted to inform their valuer of the latter rent, and the property was valued accordingly, and the Court ordered the purchase-money to be repaid and the contract rescinded; but it may well be doubted whether that decision would now be followed in a case where the negligence of a purchaser is his only equity. See the observations of Lord *St. Leonards* on that case, Sugd. V. & P. 120. So, where there is nothing in the description of the property which is liable to be misunderstood by a reasonably careful purchaser, the vendor is entitled to specific performance. *White*

v. *Bradshaw*, 16 Jur. 738; *Magee* v. *Lavell*, L. R., 9 C. P. 107; *Tamplin* v. *James*, 15 Ch. D. 215. So, also, where the mistake has been upon the vendor's side: *Powell* v. *Smith*, L. R., 14 Eq. 85; *Mackenzie* v. *Hesketh*, 7 Ch. D. 675. Of Misrepresentation.

But where the vendor by mistake sold No. 4 in a row of houses, intending to sell No. 2, the Court refused to compel the purchaser to take No. 2, even though it be in rather better repair than No. 4: it was not what the purchaser bought: *Leach* v. *Mullett*, 3 Car. & P. 115. Where, however, upon the sale of a ground lease subject to an underlease, it appeared that by mistake the wrong house had been inserted in the underlease, it being in the power of the vendor to correct the mistake, he was allowed to do so: *Grissell* v. *Peto*, 2 Sm. & G. 39.

How made available for avoiding contract.

A representation made by a vendor must, as a rule, and if it be possible, be made good by him. See *Pulsford* v. *Richards*, 17 Beav. 87. But if it be impossible for this to be done, the purchaser may avail himself of the misrepresentation of the vendor: (1) To have an abatement from the price: *Swaisland* v. *Dearsley*, 29 Beav. 430; *King* v. *Wilson*, 6 Beav. 124; *Whittingdon* v. *Corder*, 20 L. T. 175; *S. C.*, 16 Jur. 1034; *Mortlock* v. *Buller*, 10 Ves. 306, 316; *Dyer* v. *Hargrave*, 10 Ves. 505. The Courts will not, however, always enforce specific performance against the vendor with an abatement: *Durham* v. *Legard*, 34 Beav. 611; *Price* v. *North*, 2 Y. & C. Ex. 620: (2) As a defence to an action for specific performance by the vendor; for specific performance being in the nature of an indulgence and not a right, *Cox* v. *Middleton*, 2 Drew. 209, the Court, which requires those who come to it for equity to do equity, will not assist a vendor who has been guilty of any inequitable dealing: *Cadman* v. *Horner*, 18 Ves. 10; *Higgins* v. *Samels*, 2 J. & H. 460; *Upperton* v. *Nickolson*, L. R., 6 Ch. A. 436, where the return of the deposit was ordered. See *infra*, p. 645, as to deposit: (3) As a ground for rescission of the contract and return of deposit; and it must be remembered that the Court will not set aside every contract which it will not perform speci-

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fically: *Mortlock* v. *Buller*, 10 Ves. 292; but in some cases it leaves the parties to work out their legal rights under the contract: *Buxton* v. *Lister*, 3 Atk. 384; *Pulsford* v. *Richards*, 17 Beav. 89; *Wilde* v. *Gibson*, 1 H. L. C. 633; *Piggott* v. *Stratton*, 1 De G., F. & J. 33; and the Court will, if necessary, declare a lien upon the property for the amount of the deposit: *Torrance* v. *Bolton*, L. R., 14 Eq. 124 (*f*).

Misrepresentation as to Matters of Title.]—In the absence of stipulation to the contrary, a purchaser has a right to a good title for at least forty years past to be shown by the abstract: *ante*, Vol. I., p. 52. This right is one not growing out of agreement between the parties, but is given by law: Sugd. V. & P. 337. But a vendor may protect himself from his liability to deduce such title, if he clearly explains that the property offered for sale is held by a defective title. This may be done either by a statement in the particulars, or by a special stipulation in the conditions of sale. As, however, it is usual to adopt the latter course in such cases, this question will be more conveniently discussed later when treating of conditions as to title, *post*, p. 663.

Misrepresentation as to matters of tenure.

Misdescription as to Matters of Tenure.]—The property sold must be accurately described in respect of the tenure, whether freehold, copyhold or leasehold. In the case of *Ayles* v. *Cox*, 16 Beav. 23, where property sold as copyhold was found to be partly freehold, Lord *Romilly*, in dismissing the vendor's bill, said, "It is impossible to enter into a consideration of the different motives which may induce a person to prefer property of one tenure to

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(*f*) In some cases the purchaser may even indict the vendor for obtaining money under false pretences: *Reg.* v. *Burgon*, 2 Jur., N. S. 596; *Reg.* v. *Roebuck*, 2 Jur., N. S. 597.

Formerly misrepresentation was at law a good ground for defence to an action for breach of contract, or for maintaining an action for deceit, or for money had and received, or for rescission of the contract and return of the deposit. But the plaintiff was bound to elect whether he would pursue his remedy at law, or in equity: *Beaufort* v. *Glynn*, 3 Sm. & G. 213.

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another. The motives of mankind are infinite; and it is unnecessary for a man who has contracted to buy one thing, to explain why he refuses to accept another." Copyholds must not be described as freeholds, for a purchaser cannot be compelled to accept the inferior tenure in lieu of the superior: *Twining* v. *Morrice*, 2 Bro. C. C. 326; *O'Kill* v. *Whittaker*, 2 Phil. 338; *Hart* v. *Swaine*, 7 Ch. D. 42. But where there was found to be an arrangement with lord of the manor, by virtue of which the copyholds were to all intents and purposes equivalent to freeholds, and the condition as to misdescription extending to tenure, there being no fraud, the purchaser was held to his contract: *Price* v. *Macaulay*, 2 De G., M. & G. 339. Again, leaseholds must not be described as freeholds, however long the term for which they are held. See *Drewe* v. *Corp*, 9 Ves. 368, where the term was 4,000 years. See also *Wright* v. *Howard*, 1 S. & St. 190; *Price* v. *Ley*, 4 Giff. 235. An estate, which is partly let on leases for lives at low rents, must not be described as freeholds, to the rents and profits of which the purchaser will be entitled on completion: *Hughes* v. *Jones*, 3 De G., F. & J. 301.

So the description, "A freehold estate, with leaseholds adjoining," was held not to be properly satisfied by an estate of which, on delivery of the abstract, it appeared that only one-eighth part was freehold: *Fordyce* v. *Ford*, 4 Bro. C. C. 494. In that case, however, the right to object had been lost by acquiescence. This was also the case in *Calcraft* v. *Roebuck*, 1 Ves. jun. 221. See also *Burnell* v. *Brown*, 1 Jac. & W. 168; *Martin* v. *Cotter*, 3 Jo. & Lat. 496; *Munro* v. *Taylor*, 8 Ha. 51; *Dawson* v. *Brinkman*, 3 De G. & S. 376.

Enfranchised copyholds are not properly described as freeholds. This is clearly so when the lord of the manor possesses any rights to the timber and mines: *Turquand* v. *Rhodes*, 37 L. J., Ch. 830; *Mawson* v. *Fletcher*, L. R., 6 Ch. A. 91; *Upperton* v. *Nickolson*, L. R., 6 Ch. A. 436. Nor were sheepwalks properly described as freeholds. See *Vancouver* v. *Bliss*, 11 Ves. 458. It appears, however,

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that in the absence of any evidence showing that land is copyhold or customaryhold, it is, *primâ facie*, freehold: *Cattell* v. *Corrall*, 4 Y. & C., Ex. 228, at p. 236.

Misrepresentation on sales of leaseholds as to nature of lease.

The nature of the interest of a lessee who is selling must be carefully described. In *Paynter* v. *Newby*, 11 Ha. 26, a leasehold was stated to be customary leasehold of a manor, and renewable every twenty-one years on payment of the customary fine. The leasehold being not in fact renewable by custom, the purchaser obtained relief. In *White* v. *Foljambe*, 11 Ves. 337, the residue of a few years of an old term, with a reversionary lease, was held to be not properly described as a lease for fifty years. In *Leatham* v. *Allen*, 1 Ir. Ch. R. 683, a description of a leasehold as held for a term was held not to be satisfied by a lease for a part of the term, with a covenant for renewal for the remainder; but in *Carrodus* v. *Sharp*, 20 Beav. 56, it was held that, under similar circumstances, a good title was shown, it appearing that the lessor was willing to consent. In *Martin* v. *Cotter*, 3 Jo. & Lat. 496, where a property was sold as "subject to a lease for four lives, dated 1804, and one year," it was held that the description imported that the lives were named in 1804, and that, the fact being that they were not to be named until 1845, the "description" was bad. Where a house and yard were put up as leasehold for twenty-three years, and the yard was found to be held on a yearly tenancy, the contract was rescinded: *Dobell* v. *Hutchinson*, 3 A. & E. 355. Where the deficiency in the length of the term sold is not great, the purchaser may be compelled to take it with an abatement: *Guest* v. *Homfray*, 5 Ves. 818: *Stanger* v. *Eyles*, 21 Vin. Abr. (A), pl. 1; but when it is considerable he will be discharged from his contract: *Levy* v. *Fletcher*, 2 Eq. Ca. Ab. 5; *Forrer* v. *Nash*, 35 Beav. 167.

Property held by an underlease must not be so described as to appear to be held by an original lease. It is true that an underlease is a lease, just as an original lease is, the nature of the instrument in no way depending on the interest out of which the term it grants is carved; but the decisions have

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ruled that the term, when used in particulars, implies that the lease is an original lease. See *Camberwell, &c. Building Co.* v. *Holloway*, 13 Ch. D. 754. In that case, however, there were sufficient indications in the particulars and conditions to lead a purchaser to the conclusion that the lease which was being sold was an underlease, and he was held to his bargain. If an underlease be bought, the contract cannot be evaded, because the term is liable to destruction by the entry of a superior lessor for an act of some person over whom the purchaser can obtain no control: *Hayford* v. *Criddle*, 22 Beav. 477. Nor can the purchaser in such case object to the usual covenants, for he is bound by the covenants in the original lease: *Cosser* v. *Collinge*, 3 My. & K. 283; *Flight* v. *Barton*, 3 My. & K. 282: *Propert* v. *Parker*, 3 My. & K. 280; *Smith* v. *Capron*, 7 Ha. 185. See, further, as to the impropriety of describing an underlease as a lease, when the lessee is selling: *Darlington* v. *Hamilton*, Kay, 551. So in *Madeley* v. *Booth*, 2 De G. & S. 718, where the lease was discovered to be derivative, and three days short of the original lease, the purchaser was not bound. See also *Law* v. *Urlwin*, 16 Sim. 377: *Duddell* v. *Simpson*, L. R., 2 Ch. A. 102; *Bartlett* v. *Salmon*, 6 De G., M. & G. 33; *Brumfit* v. *Morton*, 3 Jur., N. S. 1198. The purchaser of an underlease may decline to take a new lease: *Mason* v. *Corder*, 2 Marsh. 332.

Sales in lots of property held under one lease.

The reason why this rule as to underleases has been made is, that the purchaser ought to know whether or not he is to have a third party between himself and the owner of the reversion, by whose acts or defaults he may be prejudiced. The same reason holds where an estate held under one lease is or has been sold in lots; for in most cases there would be a power of re-entry reserved to the original landlord, which would be exercisable on the default of any of the holders of any of the other lots. Thus, in *Tomkins* v. *White*, 3 Smith, 435, where some houses, which were the subject of the sale, were included in a lease, which comprised also a small piece of land, which was in a separate occupation, the purchaser was allowed to recover his deposit at law,

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on the ground that he would have been liable under the covenants for the whole property as originally demised. See also *Darlington* v. *Hamilton*, Kay, 551. *Paterson* v. *Long*, 6 Beav. 598; *Blake* v. *Phinn*, 3 C. B. 976; *Bartlett* v. *Salmon*, 6 De G., M. & G. 33; *Waring* v. *Hoggart*, Ry. & Moo. 39; *Dawes* v. *Betts*, 12 Jur. 412, 709; *Leuty* v. *Hillas*, 2 De G. & J. 110; *Brumfit* v. *Morton*, 3 Jur., N. S. 1198; *Edwards* v. *Wickwar*, L. R., 1 Eq. 68.

Misrepresentation as to conditions of lease.

Notice of a lease is, as a rule, notice of its contents. If a lease be stated, it is the business of the purchaser to look at it to see whether there is any covenant which may materially influence his judgment as to the value: *Hall* v. *Smith*, 14 Ves. 426. But it may be shown that, as a fact, the purchaser trusted to the representations of the vendor, and did not examine the lease: *Flight* v. *Booth*, 1 Bing. N. C. 370; *Jones* v. *Edney*, 3 Camp. 284. Moreover, whatever notice the purchaser may have had, the Court will not compel him to take a bad title: *Warren* v. *Richardson*, Younge, 1; *Shepherd* v. *Keatley*, 1 C., M. & R. 117; and notice of a lease does not fix the purchaser with notice of collateral matters mentioned in the covenants: *Darlington* v. *Hamilton*, Kay, 551. But notice of the lease is, except under special circumstances, effectual notice of all that is contained in it, so that where an assignment of a lease for the residue of the term, less ten days, was agreed upon, and the deed was prepared showing an assignment of a term of twenty-three years, less ten days, the intended assignee obtained no compensation, although the residue of the term was in fact only sixteen years: it was held that he ought to have examined the lease: *Besley* v. *Besley*, 9 Ch. D. 103.

Misrepresentation as to covenants in lease and length of term.

But if the particulars or conditions make any reference either to the terms or the covenants of the lease, great care must be taken to see that the statements made are strictly true. Thus, the length of the term for which the property is held must be accurately stated; for if the term be less than that contracted for, the purchaser may avoid the contract: *Farrer* v. *Nightingal*, 2 Esp. 639; *Hearn* v.

Tomlin, Peak. 192; *Thomson* v. *Miles*, 1 Esp. 184; *Hibbert* v. *Steer*, 1 Camp. 113; *Duffell* v. *Wilson*, 1 Camp. 401; *Madeley* v. *Booth*, 2 De G. & S. 718; *Nash* v. *Wooderson*, 33 W. R. 301. See also *Bradshaw* v. *Bennett*, 5 Car. & P. 48, where one life of the three for which the lease was said to be granted was wanting, through no fault of the vendor. But the purchaser may be compelled to take the term if he gets substantially what he meant to buy: *Belworth* v. *Hassell*, 4 Camp. 410; *Vignolles* v. *Bowen*, 12 Ir. Eq. 194. But see as to sale of property held under an underlease, *supra*, p. 606. Of Misrepresentation.

Although the vendor is not bound to state any of the covenants of his lease, even though they are unusual, *Grosvenor* v. *Green*, 5 Jur., N. S. 117, he must take care that there is not in the particulars any misrepresentation as to the covenants contained in the lease. Thus, where a public-house was sold as "a free public-house," and there was contained in the lease a covenant to take beer from a specified brewery, which covenant the auctioneer declared had been found to be bad, the purchaser was held to be entitled to be relieved of his contract: *Jones* v. *Edney*, 3 Camp. 284. Again, in *Flight* v. *Booth*, 1 Bing. N. C. 379, where the particulars stated that on the property offered for sale "no offensive trade was to be carried on, and that the premises could not be let to a coffee-house keeper or working hatter," but the covenant in the lease was much more extensive in its terms, the contract was set aside. See also *Vignolles* v. *Bowen*, 12 Ir. Eq. 194; *Van* v. *Corpe*, 3 My. & K. 269; *Flight* v. *Barton*, 3 My. & K. 282; *Stanley* v. *M'Gauvan*, 11 L. R., Ir. 314. But see *Bennett* v. *Womack*, 7 B. & C. 627, where a description of the covenants of a lease as "common and usual," was held to be correct, though the lease contained covenants for payment of land tax and sewers rate, and for re-entry if any business other than that specified were carried on. But, as a rule, it is not safe to refer to the covenants in a lease as "the usual covenants," or "common covenants," for it opens a wide ground for litigation as to what covenants As to covenants.

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are properly so described (*g*). A misrepresentation of this nature will not be cured by the reading of the lease at the time of the sale: *Flight* v. *Booth*, 1 Bing. N. C. 379; *Jones* v. *Edney*, 3 Camp. 284; *Paterson* v. *Long*, 6 Beav. 590; *Manser* v. *Back*, 6 Ha. 443; *Granger* v. *Worms*, 4 Camp. 88; *Tomkins* v. *White*, 3 Smith, 435.

As to rent.

Misrepresentation as to the rental payable under a lease would be equally fatal. See *Turner* v. *Beaurain*, Sugd. V. & P. 259; *Barnewall* v. *Harris*, 1 Taun. 430; *Mills* v. *Oddy*, 6 Car. & P. 728. Where on a sale of leaseholds the particulars, owing to a slip, did not mention that the property was subject to a ground-rent of 43*l.*, it was held that the purchaser was entitled to be discharged: *Jones* v. *Rimmer*, 14 Ch. D. 588.

Misrepresentation as to nature of property.

Misrepresentation as to the Nature of the Property.]—The vendor must be careful to avoid any inaccuracy, not only as to the nature of his title and of the tenure of the property, but also as to the nature of the subject-matter of the sale. If there be no stipulation to the contrary, the purchaser is entitled to assume that the property which he is buying is to be his in its entirety. That is to say, if it be land, that he is to have the whole of it, *usque ad cœlum et ad inferos*, together with all easements and rights usually appertaining to land, and free from all incumbrances and defects; and any derogation from this right must be expressed clearly and definitely or the contract will not stand.

Mines, &c.

Thus, if the purchaser cannot have the mines he must be expressly told so; and in consequence, when enfranchised copyholds are sold as freeholds, that description which imports that the purchaser is to

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(*g*) A covenant against alienation is not a usual covenant: *Buckland* v. *Papillon*, L. R., 2 Ch. A. 67; nor a covenant not to assign without consent: *Hampshire* v. *Wilkins*, 7 Ch. D. 555; nor a covenant for registration of assignments, &c. with the solicitor of the ground landlord on payment of a fee: *Brookes* v. *Drysdale*, 3 C. P. D. 52.

As to "usual and customary mining clauses," see *Hodgkinson* v. *Crowe*, L. R., 10 Ch. A. 622.

have the mines (*h*), which in fact are vested in the lord of the manor (*i*), is bad: *Upperton* v. *Nickolson*, L. R., 6 Ch. 436. This rule will not apply where the purchaser is a railway company: 8 Vict. c. 20, s. 77; or waterworks company: 10 Vict. c. 17, s. 18; even though the land has been bought at a large price for building purposes: *Re Metropolitan District Rail. Co. and Cotton's Trustees*, 45 L. T. 103; and when copyholds are the subject of the sale, it is not necessary to mention either that the timber or the mines are to remain in the lord, as that is an incident of the tenure. See *post*, p. 614. Of Misrepresentation.

The rule applies to such cases as that of *Whittingdon* v. *Corder*, 16 Jur. 1034, where a defect in title to an underground cellar was held fatal; and that although the house was sold to the occupying tenant by the description "as now occupied by him." See also *Lewis* v. *Braithwaite*, 2 B. & Ad. 437; *Keyse* v. *Powell*, 2 El. & B. 132; *Sparrow* v. *Oxford, &c. Rail. Co.*, 2 De G., M. & G. 108. It applies also to cases such as *Pope* v. *Garland*, 4 Y. & C., Ex. 394, where a room which projected over part of the property sold was not comprised in the sale. See also *Corbett* v. *Hill*, L. R., 9 Eq. 671. Cellars, &c.

As a rule, on every sale, where there is any timber, proper provision is made for the purchase of the timber at a fixed price or at a valuation; but when there is no such stipulation, the purchaser is entitled to the timber: as in the case of *Higginson* v. *Clowes*, 15 Ves. 516, where there was a condition in which the timber on two lots was expressly mentioned, and it was held that this was sufficient to exclude the application of the condition to two other lots which were not so mentioned. See also *Phelps* v. *White*, 7 L. R., Ir. 160 (C. A.). And any misdescription as to the timber will be Timber.

(*h*) As between vendor and purchaser mines include freestone: *Bell* v. *Wilson*, L. R., 1 Ch. A. 303; china clay: *Hext* v. *Gill*, L. R., 7 Ch. A. 699; and possibly flint: *Tucker* v. *Lingen*, 8 App. Cas. 508. In *Jeffreys* v. *Fairs*, 4 Ch. D. 448, an agreement to lease certain mines under a farm, was held to be only a licence to enter and search, and to imply no warranty.

(*i*) As to the nature and extent of the lord's right in mines and minerals, see *Eardley* v. *Granville*, 3 Ch. D. 826.

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fatal also: *Lowndes* v. *Cox*, 2 Cox. 363; particularly if the timber be ornamental: *Magennis* v. *Fallon*, 2 Moll. 588; *Denny* v. *Hancock*, L. R., 6 Ch. 1.

Rights easements, &c.

The purchaser is also entitled to all the usual rights and easements appurtenant to land, or necessary for the proper use and enjoyment thereof; and if there is anything which interferes with the property in this respect it should be disclosed. Thus defect in the right of access is a matter of importance: *Stanton* v. *Tattershall*, 1 Sm. & G. 529; *Denne* v. *Light*, 8 De G., M. & G. 774. So of the right to support for buildings from adjacent land: *Siddens* v. *Short*, 2 C. P. D. 572; *Sherbrook* v. *Tufnell*, 46 L. T. 886. So also where a property was bought for the purpose of residence, and no title could be made to a narrow strip of land between the house and the road: *Perkins* v. *Ede*, 16 Beav. 193. See also *Chamberlain* v. *Lee*, 10 Sim. 444; *Re Arnold*, *Arnold* v. *Arnold*, 14 Ch. D. 270.

Description of rent-charges.

The terms usually employed in describing the various kinds of charges upon land should be used in their common acceptation; it will not do to apply to a rent an appellation which does not properly belong to it. Thus quit rents should be so described, for while quit rents are, in equity, the subject of compensation, *Esdaile* v. *Stephenson*, 1 Sim. & S. 122; *Bowles* v. *Waller*, 1 Hay. 441, rent-charges are not, unless they are very small: *Howland* v. *Norris*, 1 Com. 59; *Prendergast* v. *Eyre*, 2 Hog. 94; *Portman* v. *Mill*, 1 Russ. & M. 696. Again, in *Stewart* v. *Alliston*, 1 Mer. 26, where a rack-rent was described as a ground rent, an injunction to restrain the purchaser from suing for his deposit at law was refused. In *Bartlett* v. *Salmon*, 5 De G., M. & G. 33, and Sugd. V. & P. xlvi. note, a description of an improved ground rent as a ground rent was held to be good, having regard to the fact that there were, in the particulars and other documents, sufficient indications of the true nature of the rent to render it immaterial by what term it was described. This decision was, however, to be without any prejudice to any action the purchaser might bring at law, and ultimately the contract was in effect rescinded. Further, it is a misdescription to describe as a

What is a ground rent.

Improved ground rent.

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ground rent a rent, to the reversion on which the usual remedies are not incident: *Langford* v. *Selmes*, 3 K. & Jo. 220.

When no powers of distress and entry.

The purchaser must also have an unincumbered property conveyed to him, unless express stipulation be made to the contrary. But as incumbrances are not a defect upon the title, it is sufficient if the vendor can show that he can pay them off: *Halsey* v. *Grant*, 13 Ves. 73; *Townsend* v. *Champernoun*, 1 Y. & Jer. 449; *Magennis* v. *Fallon*, 2 Molloy, 583; *Att.-Gen.* v. *Cox*, 3 H. L. C. 240; *In re Jackson and Oakshott*, 14 Ch. D. 851. Where an incumbrance was discovered after conveyance made, the purchaser was relieved: *Harding* v. *Nelthorpe*, Nelson, C. R. 118; *Maynard's case*, 2 Free. 2; *Bree* v. *Holbech*, Doug. 654; *Arnot* v. *Biscoe*, 1 Ves. sen. 95; *Edwards* v. *McLeay*, Cooper, 113.

Incumbrances.

Purchaser not compelled to accept an indemnity.

A purchaser will not be compelled to take the title with an indemnity: *Hays* v. *Bailey*, Sugd. V. & P. 317; *Casamajor* v. *Strode*, 1 Wils. C. C. 428; *Fildes* v. *Hooker*, 3 Mad. 193; *Nouaille* v. *Flight*, 7 Beav. 521; *Ross* v. *Boards*, 8 A. & E. 290. Nor will the vendor be required to carry out the sale, giving an indemnity: *Barnewall* v. *Harris*, 4 Taun. 430; *Taylor* v. *Martindale*, 1 Y. & C., Ex. 658. But the purchaser may bind himself to accept an indemnity: *Walter* v. *Maunde*, 1 Jac. & W. 181; *Casamajor* v. *Strode*, 1 Wils. C. C. 428. And when the indemnity is to be charged upon another estate, the title to such estate must be shown to be good: *Cottrell* v. *Watkins*, 1 Beav. 361. There must of course be no actual misdescription as to incumbrances. See *Drysdale* v. *Mace*, 5 De G., M. & G. 103; *Torrance* v. *Bolton*, L. R., 8 Ch. A. 118.

When incumbrances are matter for compensation.

When incumbrances are of small value they are treated as matter for compensation: *Howland* v. *Norris*, 1 Cox, 59; *Nouaille* v. *Flight*, 7 Beav. 521; but when they are of large amount they may be a ground for resisting specific performance: *Portman* v. *Mill*, 1 Russ. & My. 696; *In re Great Northern Rail. Co.* v. *Sanderson*, 25 Ch. D. 788. Provision is now made by sect. 5 of the Conveyancing and Law of Property Act, 1881, for the setting aside by the

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Court of a portion of the purchase-money to answer incumbrances, and for declaring the property on a sale discharged therefrom; but when the amount requisite to meet such charge is larger than the purchase-money, the Court will not exercise its power: *In re Great Northern Rail. Co.* v. *Sanderson*, 25 Ch. D. 788.

Tithes.

Tithes, like land tax, are not an incumbrance (*j*); but if the land is sold as tithe free, the liability to tithes will be a subject for compensation or for rescission, according as the fact of the property being tithe free was or was not the inducement which led the purchaser to enter into the contract: *Halsey* v. *Grant*, 13 Ves. 77; *Horniblow* v. *Shirley*, 13 Ves. 80; *Binks* v. *Lord Rokeby*, 2 Swanst. 222; *Smith* v. *Tolcher*, 4 Russ. 302; *Ker* v. *Cleobury*, Sugd. V. & P. 321; where see the correction of *Lord Stanhope's case*, 6 Ves. 678, in which Lord *Thurlow*, C., was supposed to have compelled a purchaser to take an estate subject to tithes, although he bought it as tithe free (*k*).

Redeemed land tax.

Where redeemed land tax was offered for sale, and described as one sum charged upon three houses, being in fact three several sums charged upon three houses, it was held a fatal misdescription: *Cox* v. *Coventon*, 8 Jur., N. S. 1142.

Adverse rights.

The vendor must also mention all such easements and other rights of third parties as affect the property. But this statement is subject to the limitation that a vendor will not be liable for merely not mentioning such rights or defects as are patent and

Incidents of tenure.

obvious to the ordinary observer. Thus the incidents of tenure need not be mentioned, whether the tenure be copyhold or freehold of a manor, provided it be made clear that the enfranchised lands are freehold of a manor: *White* v. *Cuddon*, 8 Cl. & F. 766; *Damerell* v. *Protheroe*, 10 Q. B. 20; *Chichester* v. *Hall*, 17 L. T. 121; *Hayford* v. *Criddle*, 22 Beav. 480. Seeing, however, that the value of copyholds and lands of customary tenure depends largely upon

(*j*) See *ante*, Vol. I. p. 80.
(*k*) See *ante*, Vol. I. p. 58.

the amount and certainty of the fines payable, it seems desirable that it should be stated what fines are payable, and whether they are or are not arbitrary. In *White* v. *Cuddon*, 8 Cl. & F. 766, it was held that a statement that the fines of a manor were arbitrary was accurate, although the fine on admission to freebench was certain. Similarly, the nature of local mining rights and drainage charges may be perhaps omitted, though it would probably be more prudent to notice them. See *Barraud* v. *Archer*, 2 Sim. 433, where the land sold was fen land, subject to certain special charges under Drainage Acts which were not referred to in the particulars. And see *Lord Townsend* v. *Granger*, 2 Sim. 436. The principle of this rule appears to be that a purchaser must be taken to have notice of that of which every one else has notice, and it applies also to what are known as patent defects. Mention of these is in no way incumbent on the vendor. Thus in *Oldfield* v. *Round*, 5 Ves. 508, where there was an obvious roadway running round the close purchased, Lord *Eldon* said, "I cannot help the carelessness of the purchaser who does not choose to inquire. It is not a latent defect." So of the ruinous state of buildings: *Grant* v. *Munt*, Cooper, 177; *Keates* v. *Cadogan*, 10 C. B. 591. But with respect to the latter, the state of repair must be obvious and immediately apparent: see *Dyer* v. *Hargrave*, 10 Ves. 505; and there must at any rate be no misrepresentation of the facts: *Schneider* v. *Heath*, 3 Camp. 506: see also *Shackleton* v. *Sutcliffe*, 1 De G. & S. 609; *Cook* v. *Waugh*, 6 Jur., N. S. 596. Where purchasers of mines had entered under an agreement and commenced operations and afterwards abandoned them, it was held that the opened workings must be taken to be so patent a matter as to affect a subsequent purchaser of the land with notice of their rights: *Holmes* v. *Powell*, 8 De G., M. & G. 572. But all latent defects must be made known by the vendor: *Schneider* v. *Heath*, 3 Camp. 506; *Baglehole* v. *Walters*, 3 Camp. 156; *Tildesley* v. *Clarkson*, 30 Beav. 419; *Lucas* v. *James*, 7 Ha. 410. But it appears that if the sale be "with all faults," and not

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vitiated with fraud, a latent defect will not avoid the contract: *Baglehole* v. *Walters*, 3 Camp. 154; *Early* v. *Garrett*, 9 B. & C. 929; *Pickering* v. *Dowson*, 4 Taun. 779; *Freeman* v. *Baker*, 5 B. & Ad. 797; *Taylor* v. *Bullen*, 5 Ex. 779. It should be noticed that a fault in a mine is of the nature of a patent defect to the extent that the purchaser must be taken to be prepared for it: *Ridgway* v. *Sneyd*, Kay, 636. So also in *Harvey* v. *Smith*, 22 Beav. 299, a purchaser was held to have notice of an easement for the passage of smoke from the fact that there were more chimney-pots on the chimneys than fireplaces within; and the fact that a house was built below the level of the sea was held to fix the purchaser with notice of an obligation to contribute to the repair of a sea-wall: *Morland* v. *Cook*, L. R., 6 Eq. 252.

In *Cato* v. *Thompson*, 9 Q. B. D. 617, however, *Jessel*, M. R., in reply to a statement of this rule about patent defects, remarked, "In some cases that is so; but I do not assent to it as a general proposition."

Right of third party to determine interest.

All circumstances under which any right exists in any third person to determine or materially affect the interest which is being sold, should also be stated. For instance, where the original lease contained a power of re-entry if certain trades were carried on, and the lessee granted underleases containing no such stipulation, the omission of this fact from the particulars, upon a subsequent sale of another portion of the estate, was held to be fatal: *Waring* v. *Hogart*, 1 Ry. & M. 39. See also, *Dawes* v. *Betts*, 12 Jur. 412, 709; *Spunner* v. *Walsh*, 11 Ir. Eq. R. 597; *Edwards* v. *Wickwar*, L. R., 1 Eq. 68.

And where an annuity charged upon the tolls of Waterloo Bridge was subject to redemption, and was sold without mention of this fact, the purchaser, who could not have discovered the fact from the Act of Parliament under which the annuity was created, recovered his deposit: *Coverley* v. *Burrell*, Sugd. V. & P. 27. So also in a case where the right of a public company, under a local Act of Parliament, to acquire and take the subject-matter of the sale was not noticed: *Ballard* v. *Way*, 1 M. & W. 520. Similarly, where a lease is deter-

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minable at the option of the lessor: *Weston* v. *Savage*, 10 Ch. D. 786; and see *Brewer* v. *Broadwood*, 22 Ch. D. 105. In *Price* v. *Macaulay*, 2 De G., M. & G. 339, it was held a misrepresentation to withhold mention of the fact that an annual rental for water was earned by means of pipes passing through lands of third parties, as to which the vendor had no more than a yearly licence.

Similarly, upon the sale by auction of a lease containing a covenant to deliver up at the end of the term, in good repair, certain specified buildings of which some have been removed, it is not sufficient merely to omit these buildings from the particulars, the fact should be stated explicitly: *Granger* v. *Worms*, 4 Camp. 83. And a lessee selling is not at liberty to conceal the fact that the lessor has given notice that if certain repairs are not executed within a given period he will re-enter: *Stevens* v. *Adamson*, 2 Stark. 422.

So also a vendor has no right to call attention by his particulars to covenants for repair, concealing the fact that there is no one liable under them: *Flint* v. *Woodin*, 9 Ha. 618. In *Seaman* v. *Vawdrey*, 16 Ves. 390, a right to enter and sink pits, of which no mention was made to the purchaser, was held fatal to the contract; so also a right of sporting: *Burnell* v. *Brown*, 1 Jac. & W. 168; a liability to repair the chancel of a church: *Forteblow* v. *Shirley*, 2 Swanst. 223; *S. C.*, *Horniblow* v. *Shirley*, 13 Ves. 80; a right of common upon enclosed land: *Gibson* v. *Spurrier*, Peak. Ad. C. 50; a right of turbary: *Martin* v. *Cotter*, 3 Jo. & Lat. 496; a right of watercourse, and to enter and repair: *Shackleton* v. *Sutcliffe*, 1 De G. & S. 609; or to repair fences and watercourses on the land itself: *Larkin* v. *Lord Rosse*, 10 Ir. Eq. 70.

How far notice of tenancy notice of tenant's interest.

But, notice of a tenancy being notice of the rights of the tenant, the vendor is not bound to give specific notice of anything beyond the fact of the tenancy. See *Hall* v. *Smith*, 14 Ves. 426; *Walter* v. *Maunde*, 1 Jac. & W. 181; *Pope* v. *Garland*, 4 Y. & C. Ex. 394; *James* v. *Lichfield*, L. R., 9 Eq. 51; *Patman* v. *Harland*, 17 Ch. D. 353. But the duty of a purchaser

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does not arise when he has not notice of the tenancy: *Caballero* v. *Henty*, L. R., 9 Ch. 447; nor does the notice extend to agreements which are personal and collateral to the lease: *Phillips* v. *Miller*, L. R., 10 C. P. 420; nor is the purchaser bound to inquire as to the interest of a person in whose tenure the property is said to have lately been: *Miles* v. *Langley*, 1 Russ. & M. 39; *Darlington* v. *Hamilton*, Kay, 551.

Occupancy of tenant.

There must also be no misrepresentation as to the nature of the occupancy of the tenant. Thus, in *Lachlan* v. *Reynolds*, Kay, 52, where the description of a house as "at present in the occupation of C., at a rental of 42*l.* per annum," with a condition providing that the purchaser would be entitled to the rents and profits upon completion, was held to be a fatal misrepresentation; C. being in possession as tenant to a person who claimed adversely to the vendor. So, where it was stated that the property was in the joint occupation of two persons as lessees, one being in effect a mere occupier: *Ridgway* v. *Gray*, 1 Mac. & G. 109. See also the case of *Hughes* v. *Jones*, 3 De G., F. & J. 307; where the property was described as being in the "occupation of H. R., and others," the leases being in fact for lives at nominal rents.

Restrictive covenants.

The same reasons operate to make it necessary that a vendor should state the nature and extent of any restrictive covenants which affect the property sold, whether these covenants affect leaseholds: *Pember* v. *Mathers*, 1 Bro. C. C. 52; *Staines* v. *Morris*, 1 Ves. & B. 8; *Mill* v. *Harris*, cit. 1 Nev. & P. 569; or freeholds: *Moxhay* v. *Inderwick*, 1 De G. & S. 708; *Leckey* v. *Higgs*, 1 Jur., N. S. 200. In the case of *Phillips* v. *Caldcleugh*, L. R., 4 Q. B. 159, it was held that where land sold as freehold was in fact subject to restrictive covenants, the purchaser could not be compelled to complete the contract. So in *Cato* v. *Thompson*, 9 Q. B. D. 616, stringent restrictive covenants were held to render a title unmarketable; and in *Re Higgins and Hitchman's Contract*, 21 Ch. D. 95, it was held that a covenant not to use a plot of land of one-eighth of an acre in extent as a public-house, or for gas works, was a fatal

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objection where the purchaser was, under the particulars, to have the fee. And compare *Ellis* v. *Rogers*, 50 L. T. 660. So, also, where the kitchen of the premises was subject to a right of user by the owner of a neighbouring tenement: *Heywood* v. *Mallalieu*, 25 Ch. D. 357. An unlimited power of re-entry on breach of a restrictive covenant is bad as transgressing the limits of perpetuity, and is no objection to title: *Flower* v. *Hartopp*, 6 Beav. 476; *Dunn* v. *Flood*, 25 Ch. D. 629.

Advantages, &c. of property.

The vendor must also be careful not to hold out any advantages as belonging to the property which either do not belong to it, or which he does not mean shall belong to it: for he will in the one case be liable to lose his bargain, and in the other to be held to his representation. As when a house was sold "with all lights," the vendor was not allowed so to use the adjoining land, although described in the contract for sale as building land, as to interfere with the lights of the house, though the lights were not ancient lights: *Swanborough* v. *Coventry*, 9 Bing. 305. So, though a representation of intended improvements may not be so clear as to bind the vendor to execute them: see *Feoffees of Heriots' Hospital* v. *Gibson*, 2 Dow. 301; and see *Taylor* v. *Gilbertson*, 2 Drew. 391; and *post*, p. 626; yet a vendor may so state his intention as to enable a purchaser to resist specific performance unless the representation is made good: *Myers* v. *Watson*, 1 Sim., N. S. 523. So where it was represented that the estate lay a mile from Horsham, the distance being really three miles, the contract was not enforced: *Duke of Norfolk* v. *Worthy*, 1 Camp. 337. See also *Shirley* v. *Davis*, 1 Bro. C. C. 410, n.; *Perkins* v. *Ede*, 16 Beav. 193; *Stewart* v. *Conyngham*, 1 Ir. Ch. R. 573; *Denny* v. *Hancock*, L. R., 6 Ch. 1; *Dykes* v. *Blake*, 4 Bing. N. C. 463; *Jones* v. *Edney*, 3 Camp. 285; *Van* v. *Corp*, 3 My. & K. 269; *Flight* v. *Barton*, 3 My. & K. 282; *Flight* v. *Booth*, 1 Bing. N. C. 379; *Price* v. *Macaulay*, 2 De G., M. & G. 339. In the case of *White* v. *Bradshaw*, 16 Jur. 738, the particulars described a house, which was in fact in a side street, as being No. 39, Regency Square, Brighton: the sale was in London, and the pur-

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chaser was held to his bargain. Lord *St. Leonards* doubted this decision: Sugd. V. & P. 19; but the purchaser ought to have made sufficient inquiries; and the description being strictly accurate, he could hardly complain. In another well-known case, *Stanton* v. *Tattershall*, 1 Sm. & G. 529, the description of the house was substantially misleading; for though the house was properly described as No. 58, Pall Mall, it was not in Pall Mall, but behind No. 57 in that street, and it was not fair to represent it as opposite to Marlborough House. Nor must a house, built partly of timber, partly of lath and plaster, and partly of brick, be described as a "brick built" dwelling-house: *Powell* v. *Doubble*, Sugd. V. & P. 23. So, again, it is a ground for avoiding a sale of a reversion where it was described as being a reversion upon the death of a person aged sixty-six, whereas he was only sixty-four, and that notwithstanding a condition for compensation, for it was impossible to calculate the alteration in value: *Sherwood* v. *Robins*, 1 Moo. & Mal. 194; 3 Car. & P. 339. In the converse case, where a life interest was sold, and the life was described as being very healthy, although it had recently been insured at a rate higher than was usual for good lives, a bill by the vendor for specific performance was dismissed with costs: *Brealey* v. *Collins*, Younge, 317.

So, in *Leyland* v. *Illingworth*, 2 De G., F. & J. 248, where a manufactory was described as well supplied with water, it was held to be a fatal objection that water could be obtained only by payment of a high rent to a water company. See *ante*, p. 591. A statement that the estate, described as being let on lease, will be in hand at a particular date, will be ground for rescission, if the property be required for actual occupation at that date, but not otherwise: *Hall* v. *Smith*, 14 Ves. 426.

As to value.

Though a representation as to the value of property may be no more than a puffing statement (see *ante*, p. 592), yet in certain circumstances, when the representation is one of fact and not of opinion, it will, if false, amount to a misrepresentation, of which a purchaser may avail himself to avoid the contract. And it appears that if the statement be

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only of an opinion, if that opinion be one which is entitled to be trusted, and which the purchaser does trust, he may be relieved—*e. g.*, where a false statement was made of a timber merchant's opinion of the value of some timber: *Buxton* v. *Lister*, 3 Atk. 386; *Small* v. *Attwood*, Younge, 490; *Clapham* v. *Shillito*, 7 Beav. 146; *Partridge* v. *Usborne*, 5 Russ. 195; *Brooke* v. *Rounthwaite*, 5 Ha. 298; *Pike* v. *Vigers*, 2 Dru. & W. 1, 150. But when the mis-statement is one of fact, it is clear that the vendor will be liable; as, for instance, that a certain annual rent is received from the property: *Lysney* v. *Selby*, Ld. Raym. 1118; *Jeudwine* v. *Slade*, 2 Esp. 573; *Wilson* v. *Fuller*, 3 Q. B. 68; *Cann* v. *Cann*, 3 Sim. 447; *Cooper* v. *Cooper*, 4 I. R., C. 75; *Price* v. *Macaulay*, 2 De G., M. & G. 344; *Bos* v. *Helsham*, L. R., 2 Ex. 72; *Dimmock* v. *Hallett*, L. R., 6 Ch. A. 21; *Palmer* v. *Johnson*, 12 Q. B. D. 32; or that the income from a business amounts to a certain sum per annum: *Dobell* v. *Stevens*, 3 B. & C. 623. So, where the cost of the stores which were consumed in a mine was represented to be lower than it really was, so that the profit was made to appear greater: *Powell* v. *Elliott*, L. R., 10 Ch. A. 424. And when a value is assigned to the yearly produce of woods, it must be based upon the proper lopping of the trees, not upon an excessive cutting of them: *Lowndes* v. *Cox*, 2 Cox, 263. In *White* v. *Cuddon*, 8 Cl. & F. 766, the description of the fines of a manor as arbitrary was held to be correct, though the freebench was, as is usually the case, fixed.

Matters which detract from value to be set forth.

The vendor is also bound to set forth all matters which may lessen the value of the property, such as outgoings for the repair of a river wall: *Shirley* v. *Stratton*, 1 Bro. C. C. 440, where the vendor was not allowed to enforce his contract because of his industrious concealment of the necessity for large annual outlay upon the repair of a wall. See also *Granger* v. *Worms*, 4 Camp. 83; *Stevens* v. *Adamson*, 2 Stark. 422, and *Powell* v. *Elliott*, L. R., 10 Ch. A. 424, *supra*.

In a case where the vendor had intrusted the property to an agent, with instructions to accept a

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lower price than that which he asked upon the occasion of the sale, but upon the purchaser asking him if this were so, denied it; the Court refused to decree specific performance, on the ground that this was a misrepresentation so material as to vitiate the contract: *Roots* v. *Snelling*, 48 L. T. 216.

As to area of estate.

The area of an estate may also be, and frequently is, the subject of misdescription amounting to misrepresentation; and such error may or not be fatal to the contract. When the area is described in vague terms by means of the phrases, "more or less," "or thereabouts," or "by estimation," the vendor may sometimes succeed in forcing a purchaser to take less than he bargained for. As, for instance, in the case of *Jolliffe* v. *Baker*, 11 Q. B. D. 255, where the property sold was described as containing so many acres "by estimation," and after conveyance executed, the purchaser sought to obtain damages because the acreage was in reality less than that stated. The Court decided against his claim; and the decision appears to rest mainly upon the fact that the words "by estimation" having been used, there was no misrepresentation. See the judgment of *Williams*, J., at p. 273, and the remarks of *A. L. Smith*, J., in the subsequent case of *Palmer* v. *Johnson*, 12 Q. B. D. 32. See also *Dendy* v. *Simpson*, 8 C. B., N. S. 1058. But in *Winch* v. *Winchester*, 1 Ves. & B. 375, these words were held not to justify a deficiency of five acres in an estate of forty-one acres; nor were they allowed to excuse the want of 100 acres out of 349: *Portman* v. *Mill*, 2 Russ. 570; or of two acres out of two closes containing, according to a specified plan, 8a. 1r. 4p.: *Gell* v. *Watson*, Sugd. V. & P. 325.

It being difficult in these matters to be absolutely accurate, it is usual for vendors to guard themselves from the consequences of a slip by means of conditions more or less specially framed. And where the condition is very strict, the purchaser may be compelled to take very much less than he intended to buy without any abatement: *Nicoll* v. *Chambers*, 11 C. B. 996; *Cordingley* v. *Cheeseborough*, 8 Jur., N. S. 585, 755; and see *Marquis Townshend* v.

Stangroom, 6 Ves. 328; *Pettitt* v. *Mitchell*, 4 Man. & G. 819; though, as a rule, such clauses are held to cover only small variations and errors: *Whittemore* v. *Whittemore*, L. R., 8 Eq. 603. Nor will the Court impute to a purchaser a knowledge of the actual quantity, even though he be thoroughly acquainted with the property, *e. g.*, as an occupying tenant: *Winch* v. *Winchester*, 1 Ves. & B. 375; *Shackleton* v. *Sutcliffe*, 1 De G. & S. 609; *King* v. *Wilson*, 6 Beav. 124. Of Misrepresentation.

So also it is possible for the vendor to misrepresent the quantum of interest which he has in the estate; and in such cases he is liable, either to have the contract rescinded, or to convey what he has it in his power to give, and to accept less purchase-money: *Jones* v. *Evans*, 12 Jur. 466; *Hooper* v. *Smart*, L. R., 18 Eq. 683; *Horrocks* v. *Rigby*, 9 Ch. D. 183. As to quantity of interest in estate.

The vendor must also not represent the condition of the property as regards repairs to be other than it is. It is not enough that there should not be such palpable fraud as was practised in the case of *Schneider* v. *Heath*, 3 Camp. 506, or such misrepresentation as that in *Loyes* v. *Rutherford*, Sugd. V. & P. 276, where property, which was in a complete state of ruin, and had been ordered to be pulled down by the district surveyor, was described as having lately undergone a thorough repair. If a house be described as in good repair, and it turn out to be in bad repair, it is matter for compensation at the least; and even granting that the defect might have been discovered by a minute examination, the purchaser is not driven to that. But the bad repair is no reason for resisting the contract unless the property be required for occupation at a given period: *Dyer* v. *Hargrave*, 10 Ves. 505; *Nokes* v. *Lord Kilmorey*, 1 De G. & S. 444. Compensation, however, will not be given where the amount of damage is trifling: *Bowles* v. *Atkinson*, Sugd. V. & P. 278; *Legge* v. *Croker*, 1 Ba. & B. 506. The same rule appears to hold in respect of representations as to the state of cultivation of an estate: *Dyer* v. *Hargrave*, 10 Ves. 505; *Grant* v. *Munt*, Coop. C. C. 175. So also any Repairs.

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serious misrepresentation as to the yearly value of woods will be fatal: *Lowndes* v. *Cox*, 1 Cox, 363; and so where there is no title made to ornamental timber: *Magennis* v. *Fallon*, 2 Molloy, 588; *Stewart* v. *Conyngham*, 1 I. R., Ch. 573; *Denny* v. *Hancock*, L. R., 6 Ch. A. 1. A misrepresentation as to the value of ordinary timber would no doubt be a matter for compensation, though in the case of *Brooke* v. *Rounthwaite*, 5 Ha. 298, where there was an absence of the means of arriving at a calculation of the lessened value, the contract was rescinded.

Where purchaser has a special object in view.

Where a purchaser has had some special object in view in entering into his contract, and he has acquainted the vendor with the fact, if the property fail to meet the required purpose, the contract will not be carried out: *Flight* v. *Barton*, 3 My. & K. 282. So also in the case of *Shirley* v. *Davis*, 4 Bro. C. C. 440, note by Belt, where a purchaser told his vendor that his object in purchasing was to become a freeholder in Essex, and it turned out that the land sold to him was in Kent (for he was appointed churchwarden of Greenwich), the contract was avoided. This case seems to have been misunderstood by Lord *Eldon*, who quotes it in *Drewe* v. *Hanson*, 6 Ves. 678, and elsewhere. It is difficult to imagine that he was more accurate in his recollection of the wharfinger's case, which he quoted on the same occasion: and the case of Lord Stanhope, who desired to purchase an estate which should be tithe free, will be found corrected in Sugd. V. & P. at p. 266. In fact, there is now no case which is of authority, which decides that a purchaser can be compelled to complete, where he has been, to the knowledge of the vendor, induced to buy for a particular purpose, or with a view to the acquisition of a particular part of the property, and the inducement has been removed by the fault of the vendor. See on this point, *Magennis* v. *Fallon*, 2 Molloy, 282; *Flight* v. *Barton*, 3 My. & K. 282; *Flight* v. *Booth*, 1 Bing. N. C. 379; *Dykes* v. *Blake*, 4 Bing. N. C. 463; *Stewart* v. *Lord Conyngham*, 1 Ir. Ch. R. 573; *Perkins* v. *Ede*, 16 Beav. 193; *Denny* v. *Hancock*, L. R., 6 Ch. A. 1; and where a vendor sold land to

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a purchaser whom he knew to be buying for building purposes, he was prevented from leasing the minerals under adjacent land in such a way as to endanger the right to support of such buildings upon the land sold: *Siddons* v. *Short*, 2 C. P. D. 572. But care must be taken to distinguish those cases where the disappointment of the purchaser has arisen from his own misunderstanding of the particulars, there being no fault in the vendor: as where the purchaser alleged that his principal inducement to purchase a property was the desire to acquire a particular building; the property was described as "the house, outbuildings and premises belonging to the late J. N.;" the vendor was unable to make any title to the building in question, which had been occupied by the late J. N. for a long period, but not for some years before his death; and the Court, holding that there had been no *falsa demonstratio*, compelled the purchaser to complete: *Stapylton* v. *Scott*, 13 Ves. 425.

Alterations in the property between contract and completion.

Any material alteration of the property by the vendor between the date of the contract and the completion of the purchase will entitle the purchaser to compensation, or may, if sufficiently material in nature or extent, avoid the contract, *e. g.*, where ornamental timber was cut down: *Magennis* v. *Fullon*, 2 Moll. 588; or where land deteriorates by reason of wilful waste on the vendor's part: *Foster* v. *Deacon*, 3 Mad. 394; or by want of cultivation, owing to his mere negligence: *Regent's Canal Co.* v. *Ware*, 23 Beav. 575; see also *Lord* v. *Stevens*, 1 Y. & C. 222; *Phillips* v. *Silvester*, L. R., 8 Ch. A. 173; but any loss or damage caused by accident will fall upon the purchaser, *e. g.*, where an annuity agreed to be purchased ceased before completion by the death of the *cestui que vie*: Sugd. V. & P. 292; see also *White* v. *Nutt*, 1 P. Wms. 61; *Spurrier* v. *Hancock*, 4 Ves. 667. So where timber was blown down: *Poole* v. *Shergold*, 2 Bro. C. C. 118; where a house was destroyed by fire: *Paine* v. *Waller*, 6 Ves. 349(*l*); by the termination of a tenancy: *Harford*

(*l*) A purchaser should always be careful to ascertain as to the insurance between the times of the execution of the contract and

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v. *Purrier*, 1 Mad. 532; or by an earthquake: *Cass* v. *Rudele*, 2 Vern. 280, *sed qu.*; see 1 Bro. C. C. 157, n.; *Robertson* v. *Skelton*, 12 Beav. 260. But when the damage is occasioned by fire, and the failure of the vender to insure amounts to a flaw in the title, it would seem that the contract will not be enforced against the purchaser: *Palmer* v. *Goren*, 25 L. J., N. S. (Ch.) 841. See *Dowson* v. *Solomon*, 1 Dr. & Sm. 1. If the accident by which the loss arises brings with it legal obligations to third parties which must be immediately met, and the vendor accordingly incurs expense, he is entitled to be recouped by the purchaser: *Robertson* v. *Skelton*, *supra*. So, on the other hand, the purchaser will reap the benefit of any accidental increase in the value of the property which may occur after the contract has been entered into but before completion. See the judgment of *Plumer*, V.-C., in *Harford* v. *Purrier*, *supra*, at p. 539.

Plans.

Plans.]—It is usual, on the occasion of the sale of land of any large area, to annex to the particulars a map or plan. Considerable care is requisite in framing the plan and the particulars in such a way as to prevent the plan from becoming part and parcel of the particulars to a greater extent than is desirable. A perfect plan, which presents to the eye of an ordinary observer a delineation of the features of the estate, is practically nothing else than a view of the estate: Sugd. V. & P. 25; Dart, V. & P. 120; and, therefore, unless it be so referred to by the particulars as to be in fact a part of the particulars, it will not operate to bind either the vendor or the purchaser. Thus, in *Dykes* v. *Blake*, 4 Bing. N. C. 463, the fact that a right of way appeared in the plan was held not to affect the purchaser with notice of such right of way; while, on the other hand, where a plan of the property sold in lots showed, as was correct, that lot 1 was supplied with water by an existing watercourse from a well in lot 4: it was held that the vendor was not thereby bound to grant to the purchaser of lot 1 any

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of the completion of the purchase; and it will sometimes be well to advance the money to keep the insurance on foot. See Sugd. V. & P. 292.

easement over lot 4: *Fewster* v. *Turner*, 6 Jur. 144. Again, the vendor will not be bound by a plan on which are represented intended new roads and improvements: *Feoffees of Heriot's Hospital* v. *Gibson*, 2 Dow. 301; *Compton* v. *Richards*, 1 Price, 27; *Squire* v. *Campbell*, 1 My. & Cr. 459; *Blanchard* v. *Bridges*, 4 A. & E. 176; *Nurse* v. *Seymour*, 13 Beav. 269; *Schreiber* v. *Creed*, 10 Sim. 9; *Randall* v. *Hall*, 4 De G. & S. 343; *Myers* v. *Watson*, 1 Sim., N. S. 523; *Beaumont* v. *Duke*, Jac. 422; *Nicholson* v. *Rose*, 4 De G. & J. 10. In the case of *Peacock* v. *Penson*, 11 Beav. 355, however, it was held that a vendor who had sold by a plan showing improvements could not afterwards so cut up the estate as to draw to it a class of occupants entirely different to that which the arrangement sketched out on the plan would have attracted. See also *Mason* v. *Cole*, 4 Ex. 375. Of Misrepresentation.

In several instances plans annexed to particulars of sale have been the vehicle of misrepresentation. In *Weston* v. *Bird*, 2 W. R. 145, the boundary of the estate, as laid down in the plan, enclosed land which belonged to an adjoining owner: and the purchaser, having been thereby misled, the vendor failed in his claim for specific performance. Similarly, in *Denny* v. *Hancock*, L. R., 6 Ch. A. 1, the vendor's bill for specific performance was dismissed on the ground that the plan showed as the apparent boundary one which was not the proper limit, and the mistake thus originated was not corrected by an inspection of the locality. In *Baskcomb* v. *Beckwith*, L. R., 8 Eq. 100, the evidence of misrepresentation was even stronger. There the estate, which on the plan was all coloured, except a small plot retained by the vendor and not marked in any way with his name, was sold in lots, which were to be subject to certain restrictive covenants. The properties of adjoining owners were not coloured, but were marked with their names. The Court refused to enforce the contract except upon the terms of the vendor entering into similar covenants with respect to the plot so retained by him. Misrepresentation by plans.

It is specially desirable, when a plan is used, that the measurements should be accurate, and that when

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the boundary does not "describe itself," it should be explained in express and clear language in the particulars; although the plan may not be so connected with the particulars as to control the description (*m*), still any variance may possibly give rise to difficulties with a purchaser. The plan should also show as clearly as possible any disadvantages attaching to the property: *Pope* v. *Garland*, 4 Y. & C. Ex. 394; *Denny* v. *Hancock*, L. R., 6 Ch. A. 1.

When the owner of land is tenant to an adjoining landowner of land contiguous to his own, he is bound, not only at the close of his tenancy to have the boundary between the two definite and distinct, but to keep it so throughout the term of his holding: *Spike* v. *Harding*, 7 Ch. D. 871.

It is often useful to insert, in conditions on sales of building land, a stipulation reserving the right to vary the plan if it be considered advisable; so that, in the event of any of the lots not being sold, the vendor may not be bound down to the execution of the roads and other works indicated: Dart, V. & P. 175.

Words.

Words.]—Some expressions have received judicial interpretations; and a list of them may be of use in framing particulars of sale.

A "brick built" house is a house built of brick in the ordinary sense, and not a house the external walls of which were composed partly of brick, partly of timber, and partly of lath and plaster: *Powell* v. *Doubble*, Sugd. V. & P. 29.

The phrase "convenient and substantial," as applied to a house, was held to be properly applied to a house which was not in good repair, with some of its walls only half a brick in thickness and cracked, and with some rooms very small and without fire places: *Johnson* v. *Smart*, 2 Giff. 151.

A "clear yearly rent" means a rent clear of all

(*m*) As to when an annexed plan will control a conveyance, see *Llewyllen* v. *Jersey*, 11 M. & W. 183; *Barton* v. *Dawes*, 19 L. J., C. P. 302; *Walsh* v. *Trevannion*, 15 Q. B. 733; *Baker* v. *Richardson*, 6 W. R. 663; *Davis* v. *Shepherd*, L. R., 1 Ch. A. 410; *Lyle* v. *Richards*, L. R., 1 E. & Ir. Ap. 222; *Harris* v. *Pepperell*, L. R., 5 Eq. 1; *Willis* v. *Watney*, 51 L. J., Ch. 181; 45 L. T. 739; 30 W. R. 424. And see further, *post*, tit. PURCHASER.

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the outgoings usually paid by the landlord, but subject to those which are usually paid by the tenant, such as the land tax: *Tyrconnel* v. *Ancaster*, 2 Ves. s. 500.

A "ground rent" means the rent at which land is let for the purpose of being improved by being built upon: *Stewart* v. *Alliston*, 1 Mer. 26; *Bartlett* v. *Salmon*, 1 Jur., N. S. 278. A sum in gross is not a ground rent: *Evans* v. *Robins*, 8 Jur., N. S. 846. An "improved rent" means a rent larger than the ground rent: *Bartlett* v. *Salmon*, 1 Jur., N. S. 278; Sugd. V. & P. 250; see *Lecoy* v. *Mogford*, 2 Jur., N. S. 1084; see also *ante*, p. 612.

When property is described as "at present in the occupation of C.," it is implied that C. is a tenant of the vendor, and for a limited period: *Lachlan* v. *Reynolds*, Kay, 52.

A description of property as "now or late in the occupation of H. R.," coupled with a condition of sale, stating that upon completion the purchaser is to be "let into receipt of the rents and profits," imports that the vendor purports to sell an estate in fee simple: *Hughes* v. *Jones*, 3 De G., F. & J. 313.

The term "farm" includes woodland, which, although not in the occupation of the tenant, forms part of the estate: *Portman* v. *Mill*, 2 Jur. 356.

A house where beer is sold "not to be drunk on the premises" is not a public-house for the sale of beer: *Pease* v. *Coats*, L. R., 2 Eq. 688 (see, however, *Fielden* v. *Slater*, L. R., 7 Eq. 523; *Jones* v. *Bone*, L. R., 9 Eq. 674); but is a "beer shop:" *Bishop of St. Albans* v. *Battersby*, 3 Q. B. D. 359; *Nicoll* v. *Fenning*, 19 Ch. D. 258.

A public-house, the lease of which contains a covenant to take beer from a particular firm of brewers, is not a "free public-house:" *Jones* v. *Edney*, 3 Camp. 285; *Modlen* v. *Snowball*, 29 Beav. 641.

"Possession," in a contract for sale of real estate, means possession with a good title: *Tilley* v. *Thomas*, L. R., 3 Ch. A. 61.

3. As to the Preparation of Conditions of Sale.

As to special restrictions respecting title.

Generally.]—The expedient of introducing into conditions of sale restrictions in regard to the title

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that the purchaser may require, has grown out of the practice of subjecting titles to a more rigorous course of examination than they formerly received. It was found, that so few titles, comparatively, could undergo the test of this scrutiny, and were capable of being pronounced strictly marketable, that vendors became awakened to a sense of the danger of entering into contracts in total ignorance of the state of the title, and of assuming too readily that, because they have derived the property by descent from their ancestor, or acquired it by purchase, they must necessarily have an unimpeachable title for the purposes of sale. It follows that a previous investigation of the title is always necessary, so that if evidence appears to be requisite to complete the title, the vendor may have an opportunity of ascertaining whether it can be obtained, and if not, of preventing, by antecedent conditions of sale or private treaty, the evidence from being required: and if (as sometimes happens) the result of the investigation be to disclose a defect endangering the actual enjoyment, and, therefore, rendering it improper for the possessor of the estate to offer it for sale upon any terms, he will avoid, by this means, the risk of an unnecessary exposure.

Necessity of investigating title before selling.

Effect of restrictive conditions.

Conditions of sale compelling the purchaser to accept a qualified title, are found to have much less effect in damping a sale than might have been expected; and even, when they go the length of providing, that the purchaser shall take any title that the vendor has (which may, in effect, mean that he is to have no title whatever), bidders are not wanting. But the fact of such a stipulation being inserted in the conditions should raise suspicion, emanating, as it does, from the party who has the best means of knowing what the title to the property is.

The necessity for more caution than is usually exercised by purchasers at auctions will strikingly appear when the result of the decisions is considered. Those decisions have gone so far as to establish that, if a purchaser enters into a stipulation to accept the vendor's title, such as it is, he cannot afterwards

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make the invalidity of the title a ground for resisting the performance of the contract. See *Freme* v. *Wright*, 4 Mad. 364; and *post*, p. 664.

Proper function of conditions of sale.

However, the honest purpose of conditions of sale is that the vendor may not put up a better title than he has, and that he may guard against objections which he cannot remove: *Smith* v. *Watts*, 4 Drew. 338. And it has been said that equity and common sense alike require that conditions shall fairly represent the real situation of the property: *Paterson* v. *Long*, 6 Beav. 590. But special care is requisite in framing conditions, so that they may not merely state nothing that is untrue, but that they may not suggest to a purchaser anything which the vendor knows is not the fact in relation to his title; for if a condition does not fairly state the objection to the title at which it is aimed the purchaser will not be bound: *Beioley* v. *Carter*, L. R., 4 Ch. A. 230; and this rule is of general application: *Seaton* v. *Mapp*, 2 Coll. 562. But, while vague conditions will be construed as far as may be in favour of the purchaser: *Hyde* v. *Dallaway*, 4 Beav. 608; *Morley* v. *Cook*, 2 Ha. 106, the purchaser will be bound by the most stringent conditions, provided they are explicit. Thus, upon a sale by the Court of a reversionary legacy in which an infant was interested, a condition that no objection should be taken on the ground of want of jurisdiction in the Court to sell the infant's reversionary personal estate, was held to be binding on the purchaser: *Nunn* v. *Hancock*, L. R., 6 Ch. A. 850. And a purchaser will be bound to accept a title, notwithstanding even a breach of trust, provided it be clearly stated in the conditions: *Nickoles* v. *Chambers*, 3 De G., J. & S. 18. See also *Hoy* v. *Smithies*, 22 Beav. 510; 2 Jur., N. S. 1011; *Wells* v. *Catling*, 7 W. R. 448. It is, therefore, impolitic to rely upon a wide condition, which, though apparently simple, is intended to cover some special flaw, and to leave to the purchaser the risk and trouble of discovering it: *Warde* v. *Dickson*, 5 Jur., N. S. 698; *Jackson* v. *Whitehead*, 28 Beav. 154.

Statements of fact in conditions to be capable of proof.

Further, it is specially necessary, in framing conditions of sale, to bear in mind that any statement of fact which is made in conditions must be proved

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by clear evidence, if necessary. Thus, in *Johnson* v. *Smiley*, 17 Beav. 233, where it was stated in a condition that the assignees of a bankrupt had power to bar the entail and sell the remainder in fee, and proposed to do so, it was held they were bound by their statement, and that as the fact was not so, the purchaser was not bound to complete. See also *Cattell* v. *Corrall*, 4 Y. & C., Ex. 228; *Symons* v. *James*, 1 Y. & C. C. C. 487. In the case of *Re Bannister*, *Broad* v. *Munton*, 12 Ch. D. 131, a condition which contained a statement that it was not known how a certain person became possessed of the property, whereas the vendor was aware of the mode in which it happened, was held not binding on a purchaser. It is sometimes advisable, when the sale is of a part of a large estate, the title to which is well known in the locality, to state this fact in the conditions; but this should not be done unless the fact be substantially correct and not difficult of proof.

Statutory conditions.

Statutory Conditions.]—Formerly it was in the power of a purchaser, upon an open contract, to put the vendor to a very large amount of trouble and expense in verifying his abstract, and in procuring the production of evidence and various deeds and documents. In some cases, as, for instance, the production of the lessor's title to the freehold upon a sale, the liability was one of a prohibitive nature; and this burden in particular was so heavily felt, that it has been held that a solicitor was liable to his client in damages for not having inserted the usual condition upon a sale of leaseholds.

The result was that upon sales, whether by private contract or public auction, it became customary for vendors to make use of a series of conditions aimed at relieving them of the burden of these liabilities and throwing them on purchasers. The practical effect of such conditions was, as a rule, beneficial; and vendors were saved from costs and expenses which were frequently heavy, and which they would have been compelled to incur without any advantage to the protection or safety of the title made.

Some of the conditions which were most fre-

quently in use have been formally sanctioned by the legislature, and made part of all contracts of sale, unless expressly excluded therefrom. **Preparation of Conditions.**

Thus, by the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 1, it is enacted that:—

"In the completion of any contract of sale of land made after the 31st day of December, 1874, and subject to any stipulation to the contrary in the contract, forty years shall be substituted as the period of commencement of title which a purchaser may require in place of sixty years, the present period of such commencement; nevertheless earlier title than forty years may by required in cases similar to those in which earlier title than sixty years may now be required" (*n*).

The Act also deals with, and incorporates, in default of agreement to the contrary, into all contracts for sale affected by the Act, certain stipulations which were previously inserted as a matter of course. By sect. 2, it is provided that:— Rules for regulating obligations and rights of vendor and purchaser.

"First. Under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold (*o*).

"Second. Recitals, statements and descriptions of facts, matters and parties, contained in deeds, instruments, Acts of Parliament or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters and declarations. Recital twenty years old to be evidence.

(*n*) The title to an advowson, for instance, must still be shown for a period of 100 years, and in the case of long leaseholds it is still necessary to produce the original lease. See *ante*, Vol. I., tit. Abstracts, p. 58. And it seems also that this section will not preclude the purchaser from requiring the production of an earlier title where the root of title is a deed executing a power or barring an entail, or other similar improper root of title; nor apparently does the Conveyancing and Law of Property Act, 1881, sect. 3, sub-sect. (3), meet this case. A voluntary conveyance is not a sufficient root of title, so that the nature of the instrument must be explicitly stated in the conditions. See *Marsh* v. *Earl Granville*, 24 Ch. D. 11.

(*o*) This rule is supplemented by 44 & 45 Vict. c. 41, s. 3, sub-s. 1, *post*, p. 634, which precludes a purchaser of an underlease from calling for the production of the leasehold reversion.

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"Third. The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents.

Costs of covenants for production.

"Fourth. Such covenants for production as the purchaser can and shall require shall be furnished at his expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser.

"Fifth. Where the vendor retains any part of an estate to which any documents of title relate, he shall be entitled to retain such documents."

These statutory conditions are supplemented by sect. 3 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), which enacts:—

"(1) Under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion.

"(2) Where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then, under a contract to sell and convey the freehold, the purchaser shall not have the right to call for the title to make the enfranchisement.

"(3) A purchaser of any property shall not require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law or stipulated for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection or inquiry, with respect to any such deed, will or other document, or the title prior to that time, notwithstanding that any such deed, will or other document, or that prior title, is recited, covenanted to be produced or noticed; and he shall assume, unless the contrary appears, that the recitals contained in the abstracted instruments of any deed, will or other document, forming part of that prior title, are correct, and give all the material contents of the deed, will or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, enrolment or otherwise.

"(4) Where land sold is held by lease (not including under-

lease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and, on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase (*p*).

"(5) Where land sold is held by under-lease, the purchaser shall assume, unless the contrary appears, that the under-lease and every superior lease were duly granted; and, on production of the receipt for the last payment due for rent under the under-lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the under-lease have been duly performed and observed up to the date of actual completion of the purchase, and further that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date.

"(6) On a sale of any property, the expenses of the production and inspection of all Acts of Parliament, inclosure awards, records, proceedings of courts, court rolls, deeds, wills, probates, letters of administration, and other documents, not in the vendor's possession, and the expenses of all journeys incidental to such production or inspection, and the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession, and all attested, stamped, office, or other copies or abstracts of, or extracts from, any Acts of Parliament or other documents aforesaid, not in the vendor's possession, if any such production, inspection, journey, search, procuring, making, or verifying is required by a purchaser, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same; and where the vendor retains possession of any document, the expenses of making any copy thereof, attested or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser (*q*).

"(7) On a sale of any property in lots, a purchaser of two or more lots held wholly or partly under the same title, shall not have a right to more than an abstract of the common title, except at his own expense.

"(8) This section applies only to titles and purchasers properly so called, notwithstanding any interpretation in this Act.

(*p*) As to peppercorn rents, see *post*, p. 679.
(*q*) See as to the effect of this provision, *post*, p. 655.

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"(9) This section applies only if and as far as a contrary intention is not expressed in the contract of sale, and shall have effect subject to the terms of the contract, and to the provisions therein contained.

"(10) This section applies only to sales made after the commencement of this Act.

"(11) Nothing in this section shall be construed as binding a purchaser to complete his purchase in any case where, on a contract made independently of this section, and containing stipulations similar to the provisions of this section or any of them, specific performance of the contract would not be enforced against him by the Court."

In addition to these provisions it is enacted by the 4th section of the Conveyancing Act, 1882, that:—

Contract for lease not part of title to lease.

"(1) Where a lease is made under a power contained in a settlement, will, Act of Parliament or other instrument, any preliminary contract for or relating to the lease shall not, for the purpose of the deduction of title to an intended assign, form part of the title, or evidence of the title, to the lease.

"(2) This section applies to leases made either before or after the commencement of this Act."

Effect of the statutory condition.

The effect of these enactments upon the various classes of conditions heretofore in general use will be noted in due course. It will be sufficient here to point out that their general effect is, that unless there be a serious flaw upon the title, or some reason making it advisable to fix a date of commencement of title less than forty years before the day of the sale, an open contract may, so far as the vendor is concerned, be safely made. And having regard to sub-s. (11) of sect. 3 of the Conveyancing and Law of Property Act, 1881, which reserves to a purchaser every defence which he would, notwithstanding the Act, have been entitled to raise in an action for specific performance, it will as a general rule be safe for a purchaser to enter into an open contract. It may, however, be questioned whether, from the purchaser's point of view, there may not be some risk in buying leaseholds or freeholds, subject to restrictive conditions, under the statutory conditions: *Patman* v. *Harland*, 17 Ch. D. 353; and see and consider *Thornewell* v. *Johnson*, 50 L. J., Ch. 641; 29 W. R. 677; but there

seems to be no greater danger than in the case of a purchaser of similar property under the usual conditions before the Act was passed; and it appears to be probable that these statutory conditions would not of themselves enable a vendor to force upon a purchaser a title which is radically bad. If a vendor desired to do this, it would, it is conceived, be necessary for him to modify them, so as to put the purchaser in possession of the whole of the facts of the case. Preparation of Conditions.

It must also be observed that the Vendor and Purchaser Act appears not to apply to contracts for the sale of incorporeal hereditaments; while the enactments of the Conveyancing and Law of Property Act, 1881, which are above referred to, apply to sales of real or personal property of every kind and description.

Trustees and executors are authorized to avail themselves of the provisions of these Acts and protected in so doing. Trustees.

By sect. 3 of the Vendor and Purchaser Act, 1874, it is enacted:—

"Trustees who are either vendors or purchasers may sell or buy without excluding the application of the second section of this Act."

And sect. 66 of the Conveyancing and Law of Property Act, 1881, is as follows:—

"(1) It is hereby declared that the powers given by this Act to any person, and the covenants, provisions, stipulations, and words which under this Act are to be deemed included or implied in any instrument, or are by this Act made applicable to any contract for sale or other transaction, are and shall be deemed in law proper powers, covenants, provisions, stipulations, and words to be given by or to be contained in any such instrument, or to be adopted in connection with, or applied to, any such contract or transaction; and a solicitor shall not be deemed guilty of neglect or breach of duty, or become in any way liable, by reason of his omitting in good faith, in any such instrument, or in connection with any such contract or transaction, to negative the giving, inclusion, implication, or application of any of those powers, covenants, provisions, stipulations, or words, or to insert or apply any others in place thereof, in any case where the provisions of this Act would allow of his doing so. Protection of trustees or solicitors adopting Act.

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"(2) But nothing in this Act shall be taken to imply that the insertion in any such instrument, or the adoption in connection with, or the application to, any contract or transaction, of any further or other powers, covenants, provisions, stipulations, or words, is improper.

"(3) Where the solicitor is acting for trustees, executors, or other persons in a fiduciary position, those persons shall also be protected in like manner.

"(4) Where such persons are acting without a solicitor, they shall also be protected in like manner."

Scheme of arrangement.

Arrangement of Conditions of Sale.]—There is of course no definite rule as to the order in which conditions of sale are to be arranged, and different principles of arrangement have been adopted by conveyancers. It will be convenient briefly to indicate the principle adopted in the following precedents.

The conduct of the transaction.

The first group of conditions deals with the mode and conduct of the sale itself, from the time when the auctioneer puts the property up until the sale is completed, and possession delivered to the purchaser. Under this heading come clauses for regulating the biddings; for settlement of disputes between bidders; as to reserve price and variation or withdrawal of lots; also clauses as to payment, and, if necessary, investment of the deposit, execution of the memorandum of agreement, completion of the purchase on a fixed day, receipt of rents and payment of outgoings by the vendor until completion, and payment of interest by the purchaser in case of delay in completion.

The abstract and title.

Next follow stipulations relating to the title which the vendor is to furnish to the purchaser. This group of conditions will contain provisions as to delivery of the abstract by the vendor, and of requisitions thereon by the purchaser; as to the instrument with which the title is to commence if the vendors are not prepared to furnish an abstract of title extending over the full statutory period of forty years; as to the evidence which the purchaser is to be entitled to require to verify the title; and as to expenses to be borne by the purchaser with regard

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to anything which may be necessary to remedy a defective title. Under this head will also come any stipulations which may be necessary to preclude requisitions and objections from being made on the ground of the parcels being insufficiently identified owing to variance between former and present names or admeasurements, or other causes.

The nature of the property.

Next in order will come conditions relating to the nature and incidents of the property sold. These will provide for any exceptions and reservations in favour of the vendor, *e.g.*, that he may retain possession of part of the premises after completion for agricultural purposes, and that timber, fixtures, or crops shall be taken by the purchaser at a sum specified in the particulars or fixed by valuation; also with regard to rights, easements, and incumbrances affecting the property, and subject to which the purchaser is to take the same. Such special conditions as may be rendered necessary by the nature and conditions of the property, such as conditions providing for indemnity against charges, apportionment of rent, or as to land tax or tithes, may be inserted in this place. The last condition of this group provides that any misdescription of the property is not to annul the sale, and as to the compensation (if any) to be allowed or made in respect of any such misdescription.

The conveyance.

The next group of conditions is that which deals with the conveyance of the property. This will include stipulations as to what are to be the contents and who the parties to the conveyance; and also all stipulations which may be necessary as to the extent to which the purchaser is to bear the expense of the preparation of the conveyance or surrender, and also of tracing the devolution of any outstanding estate or term of years, and of getting in and vesting the same in the purchaser. Where the property sold is part of a larger estate, part of which is still retained in the possession of the vendor, or where property formerly held under a single title is sold in lots, it is usual to insert here provisions as to the custody of the title deeds and as to the acknowledgments and undertakings to be given by the

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persons in whose custody the deeds are to be retained or to whom they are to be delivered.

Resale on default.

Finally, a condition is almost invariably inserted on a sale by auction that in case of the purchaser's default in performing his part of the contract, his deposit shall be forfeited, and that the vendor may resell and require all losses and expenses to be made good to him by the defaulting purchaser.

When a large estate comprising lands of various tenures and held under various titles is being sold, it may be advantageous to collect all the general stipulations together at the commencement of the conditions, afterwards dealing separately with those that relate to the different classes of property included in the sale.

Conditions on sales by the Court.

When real estate is sold by order of the Court the conditions of the sale are invariably settled by one of the conveyancing counsel of the Court. The conditions that are used vary in certain details as to routine (some of which are fixed by statute) from conditions on ordinary sales; but the only difference, so far as principle is concerned, seems to be that the Court will, in the case of a sale which is conducted under its authority, exact even more care to deal fairly with a purchaser than if determining questions arising out of a sale by a private vendor. See and consider *Bosard* v. *Coaks*, 51 L. T. 242; 33 W. R. 376.

Conduct of sale.

As to Conduct of the Sale.]—Conditions of sale usually commence with a clause regulating the mode in which the biddings are to be made at the auction, providing for the settlement of any disputes which may arise with regard to the biddings, and reserving any rights the vendor may desire with regard to withdrawing lots for sale, bidding by himself or his agent, or fixing a reserve price.

Withdrawal of lots.

"In some cases it may be desirable that the vendor should reserve to himself the option of withdrawing any lots from the sale, whether they shall have been offered to public competition or not; as, *e. g.*, in the case of a disputed bidding, or where there is not an adequate demand for the lots which are being brought into the market, or where, on the

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sale of a building estate the lots which are first offered, and which, from their position or other circumstances, materially affect the value of the remaining lots, do not fetch the price put upon them, and are in consequence bought in:" Dart, V. & P. 124. The condition providing for this power may also, in many cases, usefully include a power to combine several lots into one, or to divide one lot into several, and sell them separately.

Biddings.

Where property is to be sold without reserve, the sale will be avoided if any person is employed to bid on behalf of the vendor, unless the right to bid is reserved in the conditions: *Meadows* v. *Jenner*, 5 Mad. 54; *Thornett* v. *Haines*, 15 M. & W. 367. And when liberty is reserved to the auctioneer to make one bidding, the employment of a puffer will vitiate the sale: *Rex* v. *Marsh*, 3 Y. & J. 331; *Crowder* v. *Austin*, 3 Bing. 368. So the employment of a person, not as a defensive precaution with a view to prevent a sale at an undervalue, but to take advantage of the eagerness of bidders to screw up the price, or the employment of several bidders by the vendor, will apparently be fatal to the right of the vendor to enforce specific performance: *Smith* v. *Clarke*, 12 Ves. at p. 483. As to whether the vendor may use *one* person to bid to prevent a sale at an undervalue formerly led to much conflict of decision; at law the vendor's claim so to do was disallowed: *Bexwell* v. *Christie*, Cowp. 395; *Howard* v. *Castle*, 6 T. R. 642; *Thornett* v. *Haines*, 15 M. & W. 367; the opposite view was in several cases taken by equity judges: *Bramley* v. *Alt*, 3 Ves. 620; *Oldfield* v. *Round*, 5 Ves. 508; *Smith* v. *Clarke*, 12 Ves. 477; *Flint* v. *Woodin*, 9 Ha. 618; but this course was questioned by *Knight-Bruce*, L. J., in *Woodward* v. *Miller*, 2 Coll. 282, and by Lord *Cranworth*, C., in *Mortimer* v. *Bell*, L. R., 1 Ch. A. at p. 16; and now by the Sales of Land by Auction Act, 1867 (30 & 31 Vict. c. 48), sect. 4, "whenever a sale by auction of land would be invalid at law by reason of the employment of a puffer (*p*),

(*p*) A puffer is defined by 30 & 31 Vict. c. 48, s. 3, to be a person appointed to bid on behalf of the owner.

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the same shall be deemed invalid in equity as well as at law."

An agreement between two persons that one should not bid against another at an auction, is not illegal; and any stipulations in consideration of such an agreement may be enforced: *Galton* v. *Emuss*, 1 Coll. 243. And see *Jones* v. *North*, L. R., 19 Eq. 426.

Reserve price.

If property is to be sold subject to a reserved price, this fact should be clearly stated in the particulars, for by the last-mentioned Act it is enacted,

Rule respecting sale without reserve, &c.

Sect. 5. "That the particulars and conditions of sale by auction of any land shall state whether such land (*q*) will be sold without reserve, or subject to a reserved price, or whether a right to bid is reserved; if it is stated that such land will be sold without reserve, or to that effect, then it shall not be lawful for the seller to employ any person to bid at such sale or for the auctioneer to take knowingly any bidding from any such person."

Rule respecting sale subject to right of seller to bid as he may think proper.

Sect. 6. "And where any such sale by auction of land is declared, either in the particulars or conditions of sale, to be subject to a right for the seller to bid, it shall be lawful for the seller, or any one person on his behalf, to bid at such auction in such manner as he shall think proper."

Where, upon a sale under the Court, the conditions stated that the sale was without reserve, but that parties to the action were to be at liberty to bid, and the plaintiff (having conduct of the sale) took part in the biddings, the purchaser was held bound by the sale: *Dimmock* v. *Hallett*, L. R., 2 Ch. A. 21. A right of bidding may be reserved (*r*); but where the conditions merely stated that the sale was subject to a reserved bidding, the vendor was not entitled to bid up to the reserved price in the absence of express stipulation to that effect: *Gilliat* v. *Gilliat*, L. R., 9 Eq. 60. Where the seller reserved a right to bid once, and the auctioneer on his behalf bid thrice, and then the reserved price was declared,

(*q*) As to what is "land" in Acts of Parliament (there being no definition in this Act), see 13 & 14 Vict. c. 21, sect. 4, and *ante*, p. 637.

(*r*) A condition reserving a right to bid is usual on sales by the Court: Dart, V. & P. 1199.

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the purchaser was held to be entitled to avoid the sale: *Parfitt* v. *Jepson*, 46 L. J., C. P. 529. It is to be observed that the statute does not provide for the omission of any statement whether the land will be sold without reserve, or otherwise; but it is presumed that such omission would be deemed to be equivalent to a representation "to the effect" that the sale is to be without reserve. See Dart, V. & P. 113.

Retracting biddings.

In the absence of stipulation to the contrary, a bidder may at any time before the hammer falls, retract his bidding, since it is merely an offer, not binding on him until its acceptance by the vendor: *Payne* v. *Cave*, 3 T. R. 148; *Routledge* v. *Grant*, 4 Bing. 653; *Warlow* v. *Harrison*, 29 L. J., Q. B. 14. And as to goods, see *Phillips* v. *Bistolli*, 3 D. & Ry. 822. In the case of a sale of land by auction the purchaser is of course not bound till he has signed the memorandum: *infra*, p. 735. A condition that no person shall retract his bidding is now very usual; but Lord *St. Leonards* doubts whether it could be enforced. See Sugd. V. & P. 14; also *Jones* v. *Nanney*, 15 Pri. 99. Such a condition has, however, been held to be binding, in the case of a sale by order of the Court, on persons consenting to the sale and the agents of such persons: *Freer* v. *Rimmer*, 14 Sim. 391. The condition may also usefully contain an express power for the auctioneer to refuse biddings.

Deposit.

As to Payment of the Deposit, and Completion of the Purchase.]—On a sale by auction it is usually provided by the conditions that a deposit shall be paid by the purchaser, immediately after the sale, into the hands of the auctioneer or the vendor's solicitor (*r*). The deposit is part of the purchase-money; and, in the absence of any express arrangement (see *Edgell* v. *Day*, L. R., 1 C. P. 80, *infra*), ought not to be paid over to the vendor until the questions upon which the completion of the sale depends are all settled. The depository, therefore, holds the money as a stakeholder (*s*): *Bamford* v.

(*r*) See *post*, p. 738.

(*s*) Should any dispute arise between the parties to the contract with reference to the deposit, the auctioneer can compel

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Shuttleworth, 11 A. & E. 926, and is responsible for the payment thereof to the vendor if the contract is completed, or for its return to the purchaser if the contract is abandoned by consent, or by reason of the failure of the vendor to make out a title: *Harington* v. *Hoggart*, 1 B. & Ad. 577; *Holmes* v. *Tatton*, 1 Jur., N. S. 975; *Wiggins* v. *Lord*, 4 Beav. 30; and consequently the deposit should be retained until the contract is completed or is at an end, and it accordingly appears to whom the money belongs: *Burrough* v. *Skinner*, 5 Bur. 2629; *Berry* v. *Young*, 2 Esp. 640, n.; *Spurrier* v. *Elderton*, 5 Esp. 1. If the depository pay it over to the vendor, and it turns out that a title cannot be made to the property, he will be liable to make the amount good to the purchaser: *Gray* v. *Gutteridge*, 1 Man. & Ry. 614. Where, however, the conditions of sale provided that the deposit should be paid to the vendor's solicitor "as agent for the vendor," it was held that the solicitor was not a stakeholder, but was bound to pay the amount over to the vendor on his demand: *Edgell* v. *Day*, L. R., 1 C. P. 80.

Investment of deposit.

If the deposit is of large amount, and it appears probable that there may be delay in completion of the purchase, it is frequently arranged that the money shall be invested, in order that there may be no loss of interest. Exchequer bills are usually selected for this purpose, as they are not subject to much fluctuation in value. Where, pending a dispute, purchase-money of land contracted to be sold was invested in consols, at the suggestion of the vendor and with the assent of the purchaser, it was held, that on completion of the purchase, the vendor took the fund as it stood, without reference to the rise or fall of the stock since the investment: *Burroughes* v. *Brown*, 9 Ha. 609. Seeing, however, that the deposit is actually part of the purchase-money, held *in medio* until the completion of the purchase, neither party has any right so to deal

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them to have recourse to proceedings by interpleader: *Fairbrother* v. *Prattant*, 5 Price, 303. The auctioneer, however, is not the stakeholder of the purchaser, but of the vendor; and where the deposit is lost through his default, the loss falls upon the vendor. See *Fenton* v. *Browne*, 14 Ves. 144, 150.

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with it as to prejudice the other; but whether it be ultimately payable to the vendor or to the purchaser, it will, in the absence of express agreement between the parties, be payable with no more than interest at four per cent. Therefore, if the vendor invests the deposit without the assent of the purchaser, the latter will, in case the contract is rescinded be entitled, not to the dividends produced, but to interest at four per cent.: *Doyley* v. *Countess of Powis*, 3 Bro. C. C. 32; 1 Cox, 206. So, if the vendor fails in an action for specific performance, the Court will order him to return the deposit with interest: *Lord Anson* v. *Hughes*, 5 Sim. 227. Upon the same principle, a purchaser is not entitled to invest the deposit and throw upon the vendor the risk of the investment, unless with the vendor's sanction. An assent will not be implied against a party because notice was given to him of an investment, and he made no reply thereto: *Roberts* v. *Massey*, 13 Ves. 561. And see *Ackland* v. *Gaisford*, 2 Mad. 28; *St. Paul* v. *Birmingham Rail. Co.*, 17 Jur. 1176. A purchaser never pays interest on the deposit, even though by his default in taking an untenable objection, which renders a suit necessary, the vendor may have been prevented from receiving it from the auctioneer: *Bridges* v. *Robinson*, 3 Mer. 694. As to forfeiture of deposit, *vide infra*, p. 726.

Where a purchaser has a right to rescind the contract he can retain the deposit: *Greville* v. *Da Costa*, Peake, Ad. C. 113.

Mode of payment of deposit.

The deposit should properly be paid in cash; but it has been held that a cheque, provided it is capable of being immediately cashed, may reasonably be accepted by the auctioneer in payment of the deposit: *Farrer* v. *Lacy & Co.*, 25 Ch. D. 636; but he may not receive payment by means of a bill of exchange: *Williams* v. *Evans*, L. R., 1 Q. B. 352.

Lien for deposit.

Where a purchaser has a right to recover his deposit from the vendor, he is entitled to a lien upon the estate for the same, with interest at four per cent.: *Webb* v. *Kirby*, 7 De G., M. & G. 376; *Turner* v. *Marriott*, L. R., 3 Eq. 744; *Torrance* v. *Bolton*, L. R., 14 Eq. 124.

As to the signature by the purchaser of the

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memorandum of agreement annexed to the conditions of sale, see *post*, p. 735.

Date to be fixed for payment of balance.

It is advisable and usual to specify in the conditions a day on which the remainder of the purchase-money shall be paid and the purchase completed.

Presence of vendor at completion when necessary.

It was formerly usual, in order to prevent a purchaser from insisting upon the actual presence of the vendor at the completion, for the purpose of receiving the purchase-money (*t*), to add to the condition a provision that it shall be paid to the vendor "or as he shall in writing direct." And it may still be advisable to continue the practice, especially where the vendors are trustees. Where trustees were selling, in *Robertson* v. *Armstrong*, 28 Beav. 123, it was said that "where a person is authorized by trustees to receive trust money, and receives it accordingly, the receipt of that money by the agent binds the trustees, and discharges the person who pays it." See also *Webb* v. *Ledsam*, 1 K. & J. 385; *Re Fryer*, 3 K. & J. 317; and *West* v. *Jones*, 1 Sim., N. S. 205. It is, however, doubtful whether the decision in *Robertson* v. *Armstrong* is right in law: for if the money were lost, the trustees would most likely be held liable to their *cestuis que trustent*, and probably the purchaser would not escape. He certainly would be liable if he paid the money over under circumstances fixing him with notice that the person to whom he was about to pay it contemplated a breach of trust: *Hope* v. *Liddell*, 21 Beav. 183; *McCarother* v. *Whieldon*, 34 Beav. 107. There seems to be no change in the law upon this point made by the Conveyancing and Law of Property Act, 1881. Sect. 56 provides that:—

In case of trustees selling.

Receipt in deed or endorsed authority for payment to solicitor.

"(1.) Where a solicitor produces a deed, having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the

(*t*) This right of the purchaser was established by *Viney* v. *Chaplin*, 2 De G. & J. 468, and recently re-affirmed in *Ex parte Swinbanks*, 11 Ch. D. 525, where *Brett*, L. J., remarked in the course of his judgment: "It appears to me that it is a most wholesome decision in *Viney* v. *Chaplin*, that the mere fact that a solicitor has in his possession a deed, executed by his client,

person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed of receipt. Preparation of Conditions.

"(2.) This section applies only in cases where the consideration is to be paid or given after the commencement of this Act."

But it has been held that this section merely substitutes (so far as trustees are concerned) the signed receipt endorsed upon the executed conveyance for the special authority previously necessary, and does not give any additional power to trustees in this respect: *Re Bellamy and The Met. Board of Works*, 24 Ch. D. 387; and in *Re Flower and The Met. Board of Works*, 27 Ch. D. 592, it was held that it was still necessary for the purchaser, under ordinary circumstances, to require the presence of all the trustees, or else to pay the money into their joint account at some approved bank.

The condition also usually provides that the current rents shall be received and outgoings discharged by the vendor up to the day fixed for completion; and that, after that day, they shall be received and paid by the purchaser, the rents and outgoings being, if necessary for the purpose, apportioned. Under an agreement for sale of a lease, which provided that all "outgoings up to the day" for completion should "be shared by the vendors," it was held that current rent was an outgoing: *Lawes* v. *Gibson*, L. R., 1 Eq. 135. So is a charge under a local Act for the improvement of the street in which the houses stood, the work having been done some time before the vendor himself purchased the houses: *Midgley* v. *Coppock*, 4 Ex. D. 309. Apportionment of current rents and outgoings.

There should also be a clause providing that if, for any reason whatever, the actual completion of the purchase, *i.e.*, the payment of the purchase-money and the execution of the conveyance, shall be delayed beyond the day appointed, the purchaser shall Payment of interest in case of delay in completion.

does not give him authority to receive for his client the money which is the consideration for the deed. It would have been most dangerous if it had been decided otherwise." The recent Act sets aside these decisions. It will be observed that *any* solicitor, not necessarily the solicitor who has been acting for the vendor, may receive the money on production of the deed properly executed.

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pay to the vendor interest on the unpaid balance of the purchase-money from that day until the day of actual completion.

By the combined effect of these clauses, this condition practically reduces to hard and fast lines the equitable rule that as from the day fixed for the completion of the purchase the estate shall be taken to be the property of the purchaser, and the purchase-money the property of the vendor (*t*).

Payment of interest in absence of stipulation when purchaser in default.

In the absence of stipulation, a purchaser who is responsible for the delay in completion must pay interest from the time (if any) fixed for completion, even though he has duly appropriated his purchase-money, and it has been lying dead, and also though he has not been in possession of the estate: *Calcraft* v. *Roebuck*, 1 Ves. jun. 221; *Enraght* v. *Fitzgerald*, 2 Ir. Eq. 87; *Hyde* v. *Price*, 8 Sim. 593; *Att.-Gen.* v. *Ludlow*, 1 Hall & T. 218. The purchaser will, however, be entitled to the net profits, if any, arising from the estate: *Poole* v. *Shergold*, 2 Bro. C. C. 118; 1 Cox, 273; *Garrick* v. *Lord Camden*, 2 Cox, 231; *Mayennis* v. *Fallon*, 2 Moll. 591; *Nelson* v. *Bridges*, 2 Beav. 239; *Hardwicke* v. *Sandys*, 12 M. & W. 761; *Cuddon* v. *Tite*, 1 Giff. 395.

When vendor in default and purchaser in possession.

Even if the vendor be responsible for the delay, the purchaser, if in possession or in receipt of the rents and profits of the estate, or if he exercises acts of ownership over it, whether there be any rents or profits received or not, must pay interest upon his purchase-money, unless he duly appropriates it and

(*t*) The right of the vendor to interest, and of the purchaser to the rents, are correlative, and ought to be co-extensive. The rents are in fact the benefit, or the main part of the benefit, to be derived from the possession of the estate; and interest is the compensation for a delay in payment of principal; and the purchaser will not be liable to pay interest when he has so far transferred the purchase-money to the vendor as to deprive himself of all benefit of it, either by appropriating it or by paying it into Court: *Lewis* v. *S. W. R. Co.*, 10 Ha. 113. And so while, upon the one hand, an agreement reserving to the vendor the rents and profits until actual completion will disentitle him to interest upon the purchase-money: *Brooke* v. *Champernowne*, 4 Cl. & F. 589; *Sweetland* v. *Smith*, 1 Cr. & M. 585; on the other hand, the Court will examine with jealousy any contract which purports to give to the purchaser both rents and interest: *Birch* v. *Joy*, 3 H. L. C. 565.

keeps it lying idle, having given due notice of the appropriation to the vendor: *Powell* v. *Martyr*, 8 Ves. 146; *Roberts* v. *Massey*, 13 Ves. 561; *Ballard* v. *Shutt*, 15 Ch. D. 122. If, however, the purchase-money be not appropriated he will be chargeable, as from the date fixed for completion, even though there be ambiguity in the contract, and many years have elapsed before a title has been made: *Att.-Gen.* v. *Christchurch*, 13 Sim. 214; *Fludyer* v. *Cocker*, 12 Ves. 25; *Birch* v. *Joy*, 3 H. L. C. 565; and there being no provision in the Statutes of Limitation which bears upon the case, it appears that the arrears of interest may be claimed for more than six years: *Toft* v. *Stephenson*, 5 De G., M. & G. 735. The ordinary rules as to contracts between vendors and purchasers, including the liability of the purchaser to pay interest on unpaid purchase-money, will apply to the case of a compulsory purchase. See *Rhys* v. *Dare Valley Rail. Co.*, L. R., 19 Eq. 93; *Re Eccleshill Local Board*, 13 Ch. D. 365; *Re Pigott & G. W. Rail. Co.*, 18 Ch. D. 146. Preparation of Conditions.

If, however, the purchaser be not in possession, the rule seems now to be settled that the purchaser will be chargeable with interest only from the date when he might with safety have taken possession; that is, when the vendor made a good title: *Jones* v. *Mudd*, 4 Russ. 118; *Monk* v. *Huskisson*, 4 Russ. 121; *Carrodus* v. *Sharp*, 20 Beav. 56; *Dyson* v. *Hornby*, 4 De G. & S. 481; and a good title is not made until the verification is complete: *Parr* v. *Lovegrove*, 4 Drew. 170, and see *Parkin* v. *Thorold*, 16 Beav. 59, 71; *Sherwin* v. *Shakespear*, 5 De G. M. & G. 517; 17 Beav. 267, 275. And it appears to have been in the option of the purchaser, in such a case, to pay interest and take the rents and profits while waiting for a good title to be made; but he is not bound so to do if the interest exceed the profits: *Esdaile* v. *Stephenson*, 1 Sim. & S. 123; *Jones* v. *Mudd*, 4 Russ. 118. When purchaser not in possession.

If there is no time fixed for completion, the time from which the purchaser will be charged with interest, unless his purchase-money be duly appropriated, appears to be the date at which he entered into possession: *Att.-Gen.* v. *Christchurch*, 13 Sim. When no time fixed for completion.

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214; *Fludyer* v. *Cocker*, 12 Ves. 25; or at which he might safely have done so, under the rule above mentioned: *Forteblow* v. *Shirley*, cited 2 Swanst. 223; *Binks* v. *Lord Rokeby*, 2 Swanst. 222; *Portman* v. *Mill*, 3 Jur. 356.

When there is no date fixed for completion, or for taking possession, and the circumstances of the case are such that no actual taking of possession occurs, the date at which the purchaser is dealt with as having taken possession will be determined by various circumstances: for instance, a tenant in possession purchasing the reversion upon a lease will be taken to have gone into possession at the date of the contract: *Ex parte Manning*, 2 P. Wms. 410; *Att.-Gen.* v. *Christchurch*, 13 Sim. 214; *Birch* v. *Joy*, 3 H. L. C. 565; *Doe* v. *Stanion*, 1 M. & W. 700; on a purchase of a reversion, the wearing out of the years of the term or of the life or lives in possession will be treated as equivalent to possession: *Owen* v. *Davies*, 1 Ves. 82; *Child* v. *Lord Abingdon*, 1 Ves. jun. 94; *Davy* v. *Barber*, 2 Atk. 490; *Trefusis* v. *Lord Clinton*, 2 Sim. 359; *Champernowne* v. *Brooke*, 3 Cl. & F. 4; *Williams* v. *Glenton*, L. R., 1 Ch. A. 200. And see and consider *Morris* v. *Wood*, cited Dart, V. & P. 631.

In what event interest becomes payable under condition.

In order to prevent questions of this kind from arising a time should always be fixed for completion. Interest, if payable, will then be payable from that date. But the question in what event the interest will become payable depends to some extent upon the wording of the condition. When the form adopted is the usual one which provides that interest shall be paid during delay, "from whatever cause," the condition will cover every kind of delay, except that arising from the wilful default of the vendor: *Esdaile* v. *Stephenson*, 1 Sim. & S. 122; *Oxenden* v. *Lord Fulmouth*, Sugd. V. & P. 637; *Greenwood* v. *Churchill*, 8 Beav. 413. In *Monk* v. *Huskisson*, 4 Russ. 121, n., it was provided, by a contract, that, if "by reason of any unforeseen or unavoidable obstacles," the purchase should not be completed on a day mentioned, the purchaser should pay interest at five per cent. till completion: *Leach*, M. R., held that interest was not payable until a good title was shown;

Delay "from whatever cause."

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and a similar decision was made in *Birch* v. *Podmore*, cit. Sugd. V. & P. 635; but these cases have been disapproved of by Lord *St. Leonards*: *ibid.* (see also the observations of Lord *Cottenham*, C., in *Portman* v. *Mill*, 3 Jur. 358:) and may perhaps be regarded as of doubtful authority.

"Purchaser making default," &c.

Where the condition required interest to be paid by "the purchaser making default," it was held that a delay caused by a defect in the title was not within its scope, as the purchaser was not in default: *Denning* v. *Henderson*, 1 De G. & S. 689. So where the condition was that the purchaser should pay interest if the completion "should be delayed on his part," it was held that where the delay was attributable to the inability of the vendor to complete his title, the purchaser was not bound to pay the interest: *Perry* v. *Smith*, 1 Car. & M. 554. And see *De Visme* v. *De Visme*, 1 Mac. & G. 336, and Mr. Dart's remarks thereon, Dart, V. & P. 638 *et seq.* Since the decision in *De Visme* v. *De Visme*, 1 Mac. & G. 336, the condition has been held to apply to cases where a suit has been necessary to clear the title; as where a vendor died before completion, having devised the estate to an infant: *Bannerman* v. *Clarke*, 3 Drew. 632. In another case the purchase-money was to be provided out of a fund in Court, and there was a long delay in the approval of the title by the Court, pending which the purchase-money could not be paid, and it was decided the purchaser was entitled to the rents and must pay the interest: *Tewart* v. *Lawson*, 3 Sm. & G. 307; *S. C.*, *nom. Ex parte The Dean and Chapter of Durham*, 2 Jur., N. S. 345. In another case, after the acceptance of the title, the delay was caused by the investigation of an adverse claim, and the purchaser was compelled to pay the interest: *Grove* v. *Bastard*, 1 De G., M. & G. 79. Again, in *Vickers* v. *Hand*, 26 Beav. 630, where, owing to the death of a mortgagor, the disclaimer of two of his trustees, and the absence of the third in India, it was held that, there being no fraud or wilful delay in the case, and although it was impossible, having regard to the state of the title, for the contract to be completed on the day fixed, the

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purchaser, having thought fit to enter into a contract of this description, was bound to pay the interest accordingly. So where it was found necessary to institute a suit to rectify the powers under which the vendors sold, the purchaser was decreed to pay interest at four per cent., the vendors being bound on their part to account for the rents during the period over which interest was payable: *Lord Palmerston* v. *Turner*, 33 Beav. 524; so upon a sale of one undivided moiety, the owner of the other moiety claimed the whole, and refused to produce the deeds, thereby rendering a suit by the vendor necessary to compel production: *Williams* v. *Glenton*, L. R., 1 Ch. A. 200; and even where a mortgagor sold an estate, and fixed for completion a date some months before the mortgagees could be compelled to accept their mortgage money, the purchaser was compelled to pay interest: *Savory* v. *Underwood*, 23 L. T. 141. See also *Litchfield* v. *Brown*, 23 L. J. 176; *Kensington* v. *Bouverie*, 7 De G., M. & G. 134.

Vendor not entitled to profit by his own default.

A condition in the usual form will not, however, allow the vendor to profit by his own wilful default (*u*). Unreasonable and capricious action will constitute wilful default on the part of a vendor so as to disentitle him from receiving interest: *Elliott* v. *Turner*, 13 Sim. 477, 485; *Ex parte Bradshaw*, 16 Sim. 174; but it is not sufficient that he takes an objection which afterwards turns out untenable: *In re Windsor, &c. Act*, 12 Beav. 522. Negligence may also be so gross as to amount to wilful default, as where a vendor omitted to deliver an abstract

(*u*) The decision in the case of *Savory* v. *Underwood*, 23 L. T. 141, might at first sight suggest the propriety of qualifying this rule, as the purchaser was held to be bound to pay interest under the usual condition from the date fixed for completion, although the abstract showed mortgages, and no notice had been given to the mortgagees to pay them off, and there was no personal representative of a deceased mortgagee. The abstract, however, showed a good title to the equity of redemption, and the mortgagees might be paid off out of the purchase-money; and the ground of the decision seems to be, that the vendor had not been guilty of wilful default, as he had not bound himself to convey on any particular day. See Sugd. V. & P. 424.

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till long after the time fixed for completion: *Wallis* v. *Sarel*, 5 De G. & S. 429; but the incompleteness of abstracts delivered before the time fixed for completion will not have this result: *Rowley* v. *Adams*, 12 Beav. 476; *Cowpe* v. *Bakewell*, 13 Beav. 421; *Vickers* v. *Hand*, 26 Beav. 630. And see *Sherwin* v. *Shakespear*, 5 De G., M. & G. 517.

Appropriation of purchase-money.

In order to relieve a purchaser from the obligation to pay interest, the appropriation of the purchase-money must be such that he obtains no benefit from it, and notice must be given to the vendor of such appropriation. Lord *St. Leonards* (Sugd. V. & P. 628) lays it down that "if the money was not actually and *bonâ fide* appropriated for the purchase, or the purchaser derived the least advantage from it, or in any way made use of it, the Court would compel him to pay interest." The appropriation in *Winter* v. *Blades*, 2 Sim. & St. 393, hardly seems to comply with these conditions. In that case a purchaser in possession paid into his own bank a sum of money sufficient with his then balance to meet the purchase-money, and gave notice to the vendor that it was ready for investment. During the whole time of the delay, with the exception of four days, his balance was at least equal to the amount of the purchase-money, and he was held relieved from interest on the amount, which, having regard to his average balance at the bank, could fairly be considered to have been practically available for the purchase. The course adopted in *Kershaw* v. *Kershaw*, L. R., 9 Eq. 56, where the purchaser paid the amount he thought sufficient into a separate account at his bank, and gave notice that he had done so, seems preferable. And it will be observed that in both cases the appropriation was held good *pro tanto*. See also *Macdonnell* v. *Harding*, 7 Sim. 178; *Powell* v. *Martyr*, 8 Ves. 146; *Howland* v. *Morris*, 1 Cox, 59; *Dyson* v. *Hornby*, 4 De G. & S. 481; *Regent's Canal Co.* v. *Ware*, 23 Beav. 575. A purchaser who has placed the purchase on deposit to a separate account will be required to pay only such interest as is actually allowed by the bank: *Re Monckton and Gilzean*, 27 Ch. D. 555; *Re Golds and Norton's Contract*, 33 W. R. 333.

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Purchaser may preclude himself from appropriating.

If, however, a purchaser, knowing that a considerable time must elapse before the title can be completed, agrees to enter into possession and pay interest, he cannot, as a rule, afterwards appropriate the purchase-money, and so avoid his liability to pay interest: *Dickinson* v. *Heron*, Sugd. V. & P. 630, n. See, however, *Kershaw* v. *Kershaw*, L. R., 9 Eq. 56, and *Jones* v. *Mudd*, 4 Russ. 118; *Matson* v. *Swift*, 5 Jur. 645.

At what rate interest is payable.

When interest is payable, it is conceived that, in the absence of agreement, the old rule in equity will prevail, and it will be payable at the usual rate of four per cent. per annum. But when the rate is fixed by the conditions, the terms of the stipulation must be adhered to, even though the interest be made payable on an ascending scale: *Herbert* v. *Salisbury Railway Co.*, L. R., 2 Eq. 221; for this is not a penalty against which the Courts will relieve, but an independent contract which they will enforce; and any subsequent arrangement for the reduction of the interest payable will be construed strictly against the purchaser: *Attwood* v. *Taylor*, 1 Man. & G. 279; *Minchin* v. *Nance*, 4 Beav. 332.

In paying interest under these circumstances, income tax may be deducted: *Webb* v. *Bunny*, 1 K. & J. 216.

Meaning of "completion."

The term "completion" of the purchase does not mean the completion of the purchase in the technical sense by the execution of the conveyance, but it bears, in relation to the payment of interest, the more ordinary meaning of payment of the purchase-money: *Lewis* v. *South Western Railway Co.*, 10 Ha. 113.

Meaning of "possession."

"Possession" does not necessarily mean personal occupation: *Lake* v. *Dean*, 28 Beav. 607; where the purchaser granted a lease to a tenant in possession, it was held that he had taken possession: *Ex parte Sidebotham*, 1 Mont. & A. 655. And see *Guest* v. *Homfray*, 5 Ves. 823. See also *ante*, p. 629.

Delivery of abstract.

Conditions as to Delivery of the Abstract.]—In the absence of express stipulation to the contrary, the vendor is bound to deliver to the purchaser an abstract of his title; it is not sufficient merely to

deliver the deeds: *Horne* v. *Wingfield*, 3 M. & Gr. 33. See tit. ABSTRACTS, *ante*, Vol. I., p. 63 (*x*). **Preparation of Conditions.**

Usually the conditions of sale fix the time for delivery of requisitions and for carrying out other parts of the negotiation with reference to the delivery of the abstract. When this is so, the term abstract means a "perfect" abstract, in the sense that it "contains with sufficient clearness and sufficient fulness the effect of every instrument which constitutes a part of the vendor's title:" *Oakden* v. *Pike*, 11 Jur., N. S. 666. See also *Blackburn* v. *Smith*, 2 Exch. 783; *Steer* v. *Crawley*, 11 W. R. 861; *Gray* v. *Fowler*, L. R., 8 Ex. 249. An abstract may be perfect within the meaning of this rule, although the title thereby shown is defective: *Jeakes* v. *White*, 6 Exch. 873; *Sherwin* v. *Shakspear*, 5 De G., M. & G. 517; *Litchfield* v. *Brown*, 1 Jac. & W. 421; *Want* v. *Stallibrass*, L. R., 8 Ex. 175, 189; and although the facts alleged require to be proved: *Parr* v. *Lovegrove*, 4 Drew. 177. When, however, the effect of the documents is not properly exhibited by the abstract it is imperfect, as when a material clause in a will was not set out: *Oakden* v. *Pike*, 11 Jur., N. S. 666. And see *Parr* v. *Lovegrove*, 4 Drew. 177; Sugd. V. & P. 423, 427. If any time is specified in the conditions for delivery of the abstract, the failure of the vendor to deliver his abstract in time relieves the purchaser from the obligation in respect of time imposed upon him by any other conditions when such obligation is dependent upon the delivery of the abstract (*y*). It is, therefore, generally not advisable to specify any time for delivery of the abstract by the vendor, but merely to provide that

Condition as to time.

"Perfect" abstract.

Effect of non-delivery of abstract in time.

(*x*) It has hitherto been considered to be the duty of a vendor, in the absence of stipulation, to deliver a perfect abstract at his own expense: Dart, V. & P. 280. But it has recently been decided that, by the operation of sub-sect. (6) of sect. 3 of the Conveyancing and Law of Property Act, 1881, *ante*, p. 635, a purchaser under an open contract must pay for the abstract of any part of the 40 years' title to which he is entitled under sect. 1 of the Vendor and Purchaser Act, 1874, and which is not in the vendor's possession: *Re Johnson and Tustin*, 28 Ch. D. 84; the case is, however, understood to be under appeal.

(*y*) To meet this difficulty, it is usual to adopt a clause (in the

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the requisitions, &c. shall be delivered within a specified time after delivery of the abstract.

When time begins to run where abstract out of time or imperfect.

The time fixed for the delivery of objections and requisitions will not begin to run until the actual delivery of a complete abstract: *Blacklow* v. *Laws*, 2 Ha. 40; *Cutts* v. *Thodey*, 13 Sim. 206; *Sherwin* v. *Shakspear*, 5 De G., M. & G. 517; *Upperton* v. *Nickolson*, L. R., 6 Ch. A. 436; *Want* v. *Stallibrass*, L. R., 8 Ex. 175. And see *infra*, p. 661.

Purchaser bound to apply for abstract.

It is, however, the purchaser's duty to apply for the abstract, and if he fail to do so within a reasonable time before the time fixed for delivery, his right to avail himself of such a breach of the conditions by the vendor will not arise: *Guest* v. *Homfray*, 5 Ves. 818; *Jones* v. *Price*, 3 Anst. 924. And he will be held to have waived his right if he accept the abstract after the time fixed for its delivery without objection: *Smith* v. *Burnam*, 2 Anst. 527.

If, however, the vendor, after application made to him by the purchaser, wilfully neglects to deliver the abstract in proper time, the purchaser will be relieved from his contract: *Seton* v. *Slade*, 7 Ves. 265; *Hipwell* v. *Knight*, 1 Y. & C., Ex. 401; *Roberts* v. *Berry*, 3 De G., M. & G. 284; *Tilley* v. *Thomas*, L. R., 3 Ch. A. 61. Though time may generally be made of the essence of a contract by direct stipulation (*Parkin* v. *Thorold*, 16 Beav. 59; *Roberts* v. *Berry*, 16 Beav. 31), it seems doubtful whether it can be made so with reference to the delivery of the abstract: *Roberts* v. *Berry*, 3 De G., M. & G. 284.

Right to several abstracts on purchase of several lots.

As to the right of the purchaser of two or more lots, held under a common title, to require a separate abstract for each lot, see *ante*, p. 635.

Right to abstract when purchase-money small.

When the title is extensive, and the lots are small, it may be advisable to stipulate that a purchaser, whose purchase-money does not exceed a

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condition as to objections) in the form originally framed by Mr. Dart, that "an abstract shall, as regards any objection or requisition, be considered perfect, if it supply the information supporting the same, although it be otherwise imperfect:" Dart, V. & P. 127. But it is conceived that this clause would not apply to the concealment of a flaw on the title. See *Ward* v. *Dickson*, 5 Jur., N. S. 698.

certain amount, shall not be entitled to an abstract of the title, except at his own expense. It will in such cases be proper that the abstract should be deposited in some specified place, in order that it may be examined and extracts taken therefrom by intending purchasers and their solicitors before the sale. This course may be adopted with advantage, not only where it is intended to preclude purchasers from requiring an abstract, but also where the title is not satisfactory, as in the case of *Freme* v. *Wright*, 4 Mad. 364; or where reversionary interests are being sold, which it is difficult to describe completely and precisely within the limits of particulars of sale, because they are contingent on various events, or liable in certain circumstances to be increased or diminished in value. Preparation of Conditions.

Conditions as to Delivery of Requisitions, &c. on the Title and Rescission of Contract.]—Conditions of sale, as commonly framed, require the purchaser to deliver his objections and requisitions on the title within a specified period, and provide that any objection or requisition not delivered in accordance with the stipulation shall be taken to have been waived. This condition does not apply, however, when the objection taken is not founded upon a matter of title but upon a matter of fact apart from the title, as, for instance, a point of misrepresentation: *Price* v. *Macaulay*, 2 De G., M. & G. 339; or to an objection which goes to the root of the title: *Want* v. *Stallibrass*, L. R., 8 Ex. 175; *In re Tanqueray-Villaume and Landau*, 20 Ch. D. 465; and a waiver of objections upon the abstract will not be a waiver of objections based upon information obtained *aliunde*: *Brown* v. *Stenson*, 24 Beav. 631. The condition does not extend to inquiries based upon information furnished in reply to requisitions delivered within the proper time: *Blacklow* v. *Lawes*, 2 Hare, 40; *Morley* v. *Cook*, 2 Hare, 112. Nor will it apparently be of avail when the facts upon which the objection is founded are not known to the purchaser at the time when he delivered his requisitions: *Warde* v. *Dickson*, 5 Jur., N. S. 698. Requisitions and objections.

If the abstract be retained for a long period

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without any requisition being delivered, it may amount to a waiver of title; as, for instance, where a purchaser was in possession, and retained the abstract for four years: *Fleetwood* v. *Green*, 15 Ves. 594. See also *Margravine of Anspach* v. *Noel*, 1 Mad. 310; and *Wallis* v. *Woodyear*, 2 Jur., N. S. 178 (*z*).

Relevant questions must be answered.

The vendor must answer all relevant questions and inquiries; and even though a requisition be frivolous or untenable, it is well that the vendor, in order to secure his rights to rescind if the requisition be pressed, should answer it to the best of his ability. The purchaser, on the other hand, should abstain from requisitions which are not allowable by the contract, and not necessary for the clearing up of the title; as otherwise the Court may refuse to enforce the contract: see Sugd. Vend. 352; and in any case, the costs of any action will be materially affected by such conduct: *Newall* v. *Smith*, 1 Jac. & W. 263; *Allen* v. *Martin*, 5 Jur. 239; and consider *Deverell* v. *Lord Bolton*, 18 Ves. 505. On the other hand, well-founded and material requisitions should not be withheld; otherwise it may be questioned whether there has not been an implied waiver: *Stanton* v. *Tattershall*, 1 Sm. & G. 529; *Alexander* v. *Crosbie*, 1 J. & Lat. 666. See Dart, V. & P. 429.

Form of requisitions.

And requisitions should not be of a wide and general nature, but should be directed to the particular defect as to which the purchaser requires explanation: *Pearse* v. *Pearse*, 1 De G. & S. 12. With respect to the form in which objections and requisitions should be framed, see *Moseley* v. *Hide*, 17 Q. B. 91; *Re Monckton and Gilzean*, 27 Ch. D. 555. It is to be noted that a requisition which was formerly never omitted, as to incumbrances not disclosed by the abstract, but within the knowledge of the vendor or his solicitors, has been decided to be an inquiry which need not be answered: *Solomon* v. *Davy*, 10 Ch. D. 366, n.; *In re Ford and Hill*, 10 Ch. D. 365. In order, however, more completely to throw the responsibility on the vendor in case anything is kept back, it is still the practice of many conveyancers

(*z*) Entry into possession generally amounts to waiver of title: *Fludyer* v. *Cocker*, 12 Ves. 25; and see *ante*, Vol. I., p. 431, n.

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to conclude their requisitions with the observation, "It is assumed there is not to the knowledge of the vendor," &c.

The purchaser, before proceeding to any further step, after delivering his requisitions upon title, should allow the vendor a reasonable time in which to reply to them: *Royon* v. *Paul*, 28 L. J., Ch. 555.

Condition as to time for further requisitions.

The condition frequently limits also a time within which the further requisitions, arising out of matter furnished in reply to the requisitions first delivered, must be sent in by the purchaser. There is sometimes an advantage in this form of the condition, as it prevents the raising of any question upon this point; but these separate provisions are so seldom exactly observed that it may be considered hardly worth while to adopt this form. In fact, the vendor may, for practical purposes, rely upon the condition requiring the purchaser to pay interest after the day fixed for completion, as affording, in most cases, a guarantee that the purchaser will be reasonably diligent in delivering requisitions, whether upon the original abstract or upon evidence subsequently furnished.

Power for the vendor to rescind the contract.

The conditions usually contain provisions enabling the vendor to rescind the contract if the purchaser insists upon any requisition which the vendor is unable or unwilling to answer or comply with. The condition is generally used on the occasion of sales by order of the Court, and it has been judicially determined to be a proper condition to be used by trustees and other fiduciary vendors: *Falkner* v. *Equitable Rev. Soc.*, 4 Drew. 352. And see *Hay* v. *Smithies*, 22 Beav. 510; and *Warde* v. *Dickson*, 28 L. T., N. S. 315.

Frame of condition for rescission.

The condition should extend to objections upon any point, whether of title or conveyance, and should not be limited to requisitions on title only: *In re Jackson and Oakshott*, 14 Ch. D. 851. It should also be so framed as to enable the vendor to rescind, notwithstanding that intermediate negotiations have taken place with respect to any requisitions: *Tanner* v. *Smith*, 10 Sim. 410; *Cutts* v. *Thodey*, 13 Sim. 206; *McCulloch* v. *Gregory*, 1 K. & J. 286; otherwise the

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right to rescind may be taken to have been waived by the vendor.

If purchaser waives objection vendor cannot rescind.

If the purchaser, upon being informed that the vendor is unable or unwilling to remove the objection, at once waives it, the vendor is not entitled to insist upon rescinding the contract under the condition. In order to bring the clause as to rescinding the agreement into operation, there must be an inability or unwillingness on the part of the vendor, and an insisting upon the part of the purchaser: *Duddell* v. *Simpson*, L. R., 1 Eq. 578. But if the purchaser, after notice given by the vendor that he cannot or, in proper cases, will not, comply with a requisition, insists on it, he cannot afterwards withdraw it, and require the vendor to complete: *Duddell* v. *Simpson*, L. R., 2 Ch. A. 102. See also *Gray* v. *Fowler*, L. R., 8 Eq. 249; *G. N. Ry. Co.* v. *Sanderson*, 25 Ch. D. 788; *In re Dames and Wood*, 27 Ch. D. 172.

What is "unwillingness" with regard to rescission.

It appears to be settled by the cases that where a vendor claims to exercise his power to rescind a contract upon the ground of unwillingness to answer a requisition or remove an objection, he must show that such claim is not arbitrary, but based on fair and reasonable grounds. Indeed, to hold otherwise would be to give the vendor the right to say that that which was intended to be a sale and was a sale shall in truth be no sale at all: *Roberts* v. *Wyatt*, 2 Taun. 268; *Page* v. *Adam*, 4 Beav. 269; *Greaves* v. *Wilson*, 25 Beav. 290; *Turpin* v. *Chambers*, 29 Beav. 104; *Duddell* v. *Simpson*, L. R., 2 Ch. A. 102. Thus in *Roberts* v. *Wyatt*, 2 Taun. 268, it was held, on the one hand, that the vendor was not entitled to take advantage of his own wrong in order to destroy the contract, but must answer a requisition if it were in his power: while, on the other hand, it was held, in *Mawson* v. *Fletcher*, L. R., 6 Ch. A. 91, that where it would have been necessary for the vendor, in order to comply with a requisition, to enter into a long and expensive inquiry on a matter of title, the vendor was entitled to rescind under the condition. See also *Williams* v. *Edwards*, 2 Sim. 78; *Re Dames and Wood*, 27 Ch. D. 172; *Heppenstall* v. *Hose*, 51 L. T.

589. The condition also covers the case of a frivolous or untenable requisition: *Page* v. *Adams*, 4 Beav. 269; *Lane* v. *Debenham*, 17 Jur. 1005. Preparation of Conditions.

The condition usually provides that upon such rescission the purchaser shall be entitled to receive back no more than his deposit, without any interest or costs on either side; and this condition is binding, as is implied in the decision in *Powell* v. *Powell*, L. R., 19 Eq. 422. Return of deposit.

The power to rescind cannot be relied upon by the vendor if he enters into a contract with a defective title to the whole or to a portion of the estate sold: *Nelthorpe* v. *Holgate*, 1 Coll. 203. Still less will it avail him when he can show no title at all to the property: *Bowman* v. *Hyland*, 8 Ch. D. 988; see also *Heppenstall* v. *Hose*, 51 L. T. 589. If he has been guilty of misrepresentation he may forfeit his right to rescind: *Price* v. *Macaulay*, 2 De G., M. & G. 347; *Cordingley* v. *Cheeseborough*, 8 Jur., N. S. 585, 755; *Whittemore* v. *Whittemore*, L. R., 8 Eq. 603; nor can he by means of the condition evade the performance of any duty cast upon him by the contract: *Page* v. *Adam*, 4 Beav. 269; *Greaves* v. *Wilson*, 25 Beav. 290; *Engel* v. *Fitch*, L. R., 3 Q. B. 314; nor can he rescind if the question at issue is a matter of compensation: *Newby* v. *Painter*, 17 Jur. 483; 11 Ha. 26; *Hoy* v. *Smithies*, 22 Beav. 510. The purchaser's refusal to complete subject to restrictive covenants not disclosed by the abstract will not entitle a vendor to rescind: *Re Monckton and Gilzean*, 27 Ch. D. 555. When vendor cannot rescind.

It may be useful to note, generally, that time, though formerly of the essence of the contract at law, was not considered to be so in equity: *Parkin* v. *Thorold*, 16 Beav. 59; *Roberts* v. *Berry*, 3 De G., M. & G. 284; *Tilley* v. *Thomas*, L. R., 3 Ch. A. 67. And by the Judicature Act, 1873 (36 & 37 Vict. c. 66), sect. 25, sub-s. 7, stipulations in contracts as to time or otherwise, which would not before the passing of the Act have become of the essence of such contracts in a Court of Equity, are to receive in all Courts the same construction and effect as they would formerly have received in a Court of Equity. It is, therefore, Time to be of the essence of the contract.

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necessary to consider only the cases in which equity holds time to be of the essence of the contract.

Time made of essence by act of parties.

Time may be made of the essence by the express terms of the agreement: *Parkin* v. *Thorold*, 16 Beav. 59; or by subsequent notice from one party to the other: *Stewart* v. *Smith*, 6 Ha. 223, n.; *Benson* v. *Lamb*, 9 Beav. 502; *Webb* v. *Hughes*, L. R., 10 Eq. 281. But such notice must be reasonable: *Reynolds* v. *Nelson*, 6 Mad. 18; *Southcomb* v. *Bishop of Exeter*, 6 Ha. 213; *King* v. *Wilson*, 6 Beav. 124; *Pegg* v. *Wisden*, 16 Beav. 239; *Macbryde* v. *Weeks*, 22 Beav. 533; *McMurray* v. *Spicer*, L. R., 5 Eq. 527; *Crawford* v. *Toogood*, 13 Ch. D. 153; *Green* v. *Serin*, 13 Ch. D. 589; *Studds* v. *Watson*, W. N. 1884, p. 217.

Time made of essence by nature of property or circumstances.

So, also, the nature of the property or other circumstances connected with it may make time of the essence of the contract. Thus, where the sale is of a public-house as a going concern: *Cosslake* v. *Till*, 1 Russ. 376; *Day* v. *Luhke*, L. R., 5 Eq. 336; *Cowles* v. *Gale*, L. R., 7 Ch. A. 12; or of mines: *Parker* v. *Firth*, 1 Sim. & S. 199; or where the property is subject to variation in value from time to time—as stocks: *Doloret* v. *Rothschild*, 1 Sim. & S. 590; or where it wears out by lapse of time—as a life annuity: *Withy* v. *Cottle*, Turn. & R. 78; or a leasehold which will soon determine: *Hudson* v. *Temple*, 29 Beav. 536; or, on somewhat similar grounds, a reversion: *Newman* v. *Rogers*, 4 Bro. C. C. 391; *Spurrier* v. *Hancock*, 4 Ves. 667; *Patrick* v. *Milne*, 2 C. P. D. 342; or where the property was bought for a specified purpose, which will be defeated if time be not so treated; as where a house was bought for a residence: *Tilley* v. *Thomas*, L. R., 3 Ch. A. 61; *Webb* v. *Hughes*, L. R., 10 Eq. 281, and see *Wright* v. *Howard*, 1 Sim. & S. 190; or where a delay will alter the rights of the parties, as where the vendors are a fluctuating body: *Carter* v. *Dean, &c. of Ely*, 7 Sim. 211. The presumption that time is to be of the essence of the contract may be rebutted by other terms of the contract; as in *Patrick* v. *Milne*, 2 C. P. D. 342, where the conditions provided for a possible delay in completing. And this term of the contract may be waived: *Cutts* v. *Thodey*, 13 Sim. 206; *Nokes*

v. *Lord Kilmorey*, 1 De G. & S. 444; *Smith* v. *Burnam*, 2 Anst. 527. Preparation of Conditions.

Conditions as to Title.]—A purchaser, in the absence of stipulation, is entitled to require from the vendor a complete and perfect title to the property sold for the period limited by law, and subject to such stipulations as are by statute incorporated in every contract where the contrary is not expressed. It is therefore usual, and in many cases necessary, to insert, in a contract for sale, conditions relating to the state of the title. In this matter, even more than in the case of the nature and extent of the property sold, the purchaser is at the mercy of the vendor, and dependent upon him for all his information. And the vendor must be *opimæ fidei* in laying before the purchaser the limitations which it is intended to set upon his right to a good title, no less than in explaining the condition of the property which he is selling. As was said by *Fry*, J., in *In re Marsh and Earl Granville*, 24 Ch. D. 17: "He must state the truth, and all the truth, which is relevant to the matter in hand. The reason for this is twofold. In the first place, the vendor knows the condition of the title, and the purchaser does not, and that puts upon the vendor the burden of being very explicit in his description. In the next place, the descriptions in the contract or conditions of sale are the only materials which the purchaser has for deliberating upon before he enters into the purchase. He knows as much as is told him, and no more, and therefore he ought to be put into possession of everything, so far as it is touched upon by the conditions of sale, which is likely to influence his mind in determining whether he will buy or not." Title, generally.

The right of a purchaser to have a good title to the property he has bought is not a matter of contract, but arises out of the common law: *Doe* v. *Stanion*, 1 M. & W. 701; *Sharland* v. *Leifchild*, 10 A. & E. 529; *Hall* v. *Betty*, 4 Man. & Gr. 410. If, therefore, the vendor desires in any way to restrict the right of a purchaser to a good title, he must do so by definite and explicit conditions: *Souter* v. *Drake*, 5 B. & Ad. 992; Purchaser's right to a good title.

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Shepheard v. *Keatley*, 1 C., M. & R. 127; *Seaton* v. *Mapp*, 2 Coll. 556; *Wheeler* v. *Wright*, 7 M. & W. 359; *Groom* v. *Booth*, 1 Drew. 548; *Drysdale* v. *Mace*, 2 Sm. & G. 225; *Ashworth* v. *Mounsey*, 2 C. L. R. 418; *Hume* v. *Bentley*, 5 De G. & S. 520: *Rhodes* v. *Ibbetson*, 4 De G., M. & G. 787.

Right to good title may be rebutted.

The purchaser's common law right to a good title is only a presumption arising from the fact of the contract, and may be rebutted. Per *Jessel*, M. R., in *Cato* v. *Thompson*, 9 Q. B. D. 616, 619. The fact that the purchaser at the time of entering into the contract was aware that the vendor could not make a good title, may destroy his common-law right to insist upon having a good title. See *In re Gloag, and Miller's Contract*, 23 Ch. D. 320. If, however, the contract contains an express stipulation to make a good title, the purchaser is entitled to have the contract fulfilled, although he may have been at the time when he entered into the contract quite aware of the vendor's inability at that time to complete it: *Barnett* v. *Wheeler*, 7 M. & W. 634; *Nouaille* v. *Flight*, 7 Beav. 521; *Cato* v. *Thompson*, 9 Q. B. D. 616; *In re Gloag and Miller's Contract*, 23 Ch. D. 320.

Condition to accept vendor's title, &c.

But while the purchaser is entitled to construe strictly any restriction on his right to a good title it is competent for the vendor to bind the purchaser by any stipulation as to title, however stringent, provided it be clear and explicit. Thus the purchaser was held bound by a condition stating that the property of a bankrupt was being sold "under such title as he recently held the same, an abstract of which may be seen" at a specified place: *Freme* v. *Wright*, 4 Mad. 364. So by a stipulation that the only receipt and conveyance a purchaser was to have would be those of an equitable mortgagee, and the assignees of the bankrupt mortgagor: *Groom* v. *Booth*, 1 Drew. 548. So under a condition that the purchaser was to accept A.'s title "without inquiry," he was compelled to take the title, although the legal estate was outstanding in a mortgagee who had been paid off by A.'s vendor: *Duke* v. *Barnett*, 2 Coll. 337. But this is not so, if any statement made by the vendor with respect to his title is inaccurate: *Nash* v.

Wooderson, 33 W. R. 301. Again, the purchaser was bound by a condition, stating that the vendors, who were assignees of a bankrupt, sold such right or title as they might have with all faults: *Early* v. *Garrett*, 9 B. & C. 928. In *Wilmot* v. *Wilkinson*, 6 B. & C. 506, the vendors were to convey "such title as they received from A. and B.;" in *Keyse* v. *Heydon*, 20 L. T. 244, the condition was that the purchaser was to accept "such title as the vendor has" (*a*); in *Tweed* v. *Mills*, L. R., 1 C. P. 39, the lessor was to let "all his right, title, and interest" in "certain premises" to B.; in *Best* v. *Hamand*, 12 Ch. D. 1, the conditions required the purchaser to accept a title beginning with a conveyance to the vendor; and in all these cases the purchaser was held to be bound. See also *Rosenberg* v. *Cook*, 8 Q. B. D. 162. Preparation of Conditions.

Not only must a condition limiting the right to a good title be explicit (*b*), but the condition must be framed so as not to suggest to a purchaser that which the vendor knows is not the actual state of the title. See *Re Bannister*, *Broad* v. *Munton*, 12 Ch. D. 131; *Marsh* v. *Earl Granville*, 24 Ch. D. 11. The following are some examples of conditions which have been held to be misleading, and therefore bad: In *Edwards* v. *M'Leay*, G. Cooper, 208, the vendor had so framed his conditions as to conceal a material defect in his title. See also *Else* v. *Else*, L. R., 13 Eq. 196. In *Cruse* v. *Newell*, 2 Jur., N. S. 536, on a sale by a transferee of a mortgage, it being doubtful whether the transfer had not destroyed the power of sale, it was held that the usual condition that the mortgagor's concurrence should not be required was misleading. In *Smith* v. *Ellis*, 14 Jur. Misleading conditions.

(*a*) The term, "such title as the vendor has," means the best title that he can make from the materials in his possession: *Keyse* v. *Heydon*, 20 L. T. 244; *Morris* v. *Kearsley*, 2 Y. & C., Ex. 139. So, from the case of *Gordon* v. *Mahoney*, 12 Ir. Eq. Rep. 383, it appears that a condition that the title is to be shown to the "satisfaction of counsel," means that the purchaser's counsel is to be reasonably satisfied with it.

(*b*) A stipulation that the purchaser is to be entitled "to such deeds as the vendor has" will not avail in this respect: *Southby* v. *Hutt*, 2 My. & C. 207; and see *Osborne* v. *Harvey*, 7 Jur. 229.

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682, a condition that the purchaser should be content with an assignment from the vendors, who were the executors of the equitable interest, no mention being made of the fact that the legal estate was not represented, was held invalid. In *Harnett* v. *Baker*, L. R., 20 Eq. 50, a condition that the testator, with whose will the title was to commence, was to be assumed to have been seised in fee, was held misleading, the fact being that at the time of his death he was entitled to no more than a contract for sale, which was not completed for many years afterwards. See also *Blenkhorn* v. *Penrose*, 43 L. T. 668; 29 W. R. 237. In the case of *In re Marsh and Earl Granville*, 24 Ch. D. 11, it was held improper to describe a voluntary conveyance so as to lead a purchaser to assume it to be an ordinary conveyance; for the Court will not compel a purchaser to take a title under a deed made subsequently to and in derogation of a voluntary conveyance, so as to make the title good by destroying it: *Clark* v. *Willott*, L. R., 7 Ex. 313.

Purchaser must investigate title.

The mere assertion, however, by the vendor that he has a good title, on the faith of which a purchaser relies without investigating the title, is not necessarily such a misrepresentation as will preclude the vendor from specific performance: *Hume* v. *Pocock*, L. R., 1 Ch. A. 379; for a purchaser neglects to investigate the title at his own risk: *Jackson* v. *Rowe*, 1 Phill. 255; *Neesom* v. *Clarkson*, 2 Hare, 173; *West* v. *Reid*, 2 Hare, 260; *Patman* v. *Harland*, 17 Ch. D. 353.

Purchaser's right when conditions misleading.

Where the conditions with respect to the title are such that the purchaser is entitled to rescind the agreement on the ground that they are misleading, he appears to be at liberty to refuse to complete, except upon the condition that the vendor shall show him such a title as would have been shown if the conditions had been accurate and the title had been made out according to them. The purchaser seems not to have a right to insist upon more than the rescission of the contract: *In re Bannister, Broad* v. *Munton*, 12 Ch. D. 131. See the judgment of *Jessel*, M. R., *Smith* v. *Robinson*, 13 Ch. D. 148; *In re Marsh and Earl Granville*, L. R., 24 Ch. D. 11.

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The right to call for a title for the period prescribed by law may be precluded by properly-framed conditions; and in many cases it is very necessary for the protection of the vendor that this should be done. Conditions of this class have usually in practice very little effect in preventing purchasers from giving a fair price for the property sold; and they may save a vendor a great deal of expense and trouble.

Conditions restrictive of right to title.

Title to freeholds.

The title to freeholds is now required, upon an open contract, to be shown for a period of forty years. See *ante*, p. 604, and Vol. I. tit. ABSTRACTS, p. 52. Where it is advisable for any reason to fix a shorter period, it must be done by condition. Sect. 3, sub-s. (3), of the Conveyancing and Law of Property Act, 1881 (set out at length Vol. I. pp. 53, 54), provides that a purchaser shall not make any inquiry in respect of the title prior to the date fixed for the commencement of title, whether that date be fixed by the statute or by stipulation.

Purchaser's right to raise objection on evidence obtained *aliunde*.

But the limitation thus placed upon the purchaser's right does not appear to be sufficient to preclude him from objecting to the title if he can obtain evidence elsewhere which shows that it is bad. Thus, in *Waddell* v. *Wolfe*, L. R., 9 Q. B. 515, the condition was that "no requisition or inquiry should be made respecting" the prior title; and it was held that the purchaser, having discovered the legal estate to be outstanding, was not bound by the condition, but could raise the objection and refuse to complete. See also *Shepherd* v. *Keatly*, 1 C., M. & R. 117. Nor has such a condition been held to cover a case of mutual mistake: *Jones* v. *Clifford*, 3 Ch. D. 779. Nor does it seem to guard sufficiently against the case where the document fixed upon as the root of title shows that there is a flaw in the title; see *Philips* v. *Caldcleugh*, L. R., 4 Q. B. 159, where the words were "no purchaser shall investigate or take objection in respect of the title prior to the commencement of the abstract," and the deed assigned as the root of title disclosed restrictive covenants of a serious nature. See also *Sellick* v. *Trevor*, 11 M. &

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W. 722. In the same way, in *Smith* v. *Robinson*, 13 Ch. D. 148, it was held, that a condition which required the purchaser not to make any requisition on the earlier title, or to make any inquiry into it, would not preclude a purchaser from objecting on the ground of a flaw in the title accidentally disclosed by the vendor himself. Indeed, in *Darlington* v. *Hamilton*, Kay, 558, it is laid down that "whatever be the terms of the conditions of sale, if the purchaser obtain information *aliunde* that the title of the vendor is not clear and distinct, he has a right to insist upon the objection." But this doctrine is perhaps laid down in rather too general terms; for in *Hume* v. *Bentley*, 5 De G. & S. 520, it was held that a condition which provided that prior title "would not be shown and should not be inquired into," precluded inquiry into such title for any purpose whatever. See also *Spratt* v. *Jeffrey*, 10 B. & C. 249; *Freme* v. *Wright*, 4 Mad. 364. In *Best* v. *Hamand*, 12 Ch. D. 1, the nature of the property (surplus land sold by a railway) was disclosed by the contract, and was held to fix the purchaser with knowledge of its nature, so that he was bound, having contracted not to question his vendor's title, to accept it. On the other hand, in *Hume* v. *Bentley*, 5 De G. & S. 520, it is suggested that there may be titles so bad that it would practically be a fraud for a vendor to bring them into the market and bind a purchaser to accept them. See also *Edwards* v. *McLeay*, G. Coop. 308. And though where the fullest disclosure is made, as in *Freme* v. *Wright*, 4 Mad. 364, and apparently also in *Best* v. *Hamand*, 12 Ch. D. 1, the purchaser would be bound, provided the condition was stringent enough, to accept a bad title, yet it can hardly be possible by any condition to insist that a purchaser shall accept without question a title which is radically imperfect, unless the vendor put him in full possession of all the facts and documents relating to the matter: *Warde* v. *Dickson*, 28 L. J., N. S. 315. Thus in *Else* v. *Else*, L. R., 13 Eq. 196, where the condition was that the purchasers should accept the deed specified as the commencement of the title as a good substantive root of title, and

Objections based on evidence obtained *aliunde*.

Purchaser must have full information if he is to be bound to accept bad title.

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should not make any objection or requisition in respect of any prior title, and there was a fatal flaw in such prior title, of which the vendor was aware, it was held by Lord *Langdale* that the sale being under the Court the condition was certainly bad; and he adds, "I am of opinion that such a condition would be bad as a fraudulent misleading condition in any sale, for it professes, or induces the buyer to believe, that the recital accurately represents the will, which it does not." Compare *Harnett* v. *Baker*, L. R., 20 Eq. 50. Where, therefore, any flaw of a serious description is intended to be covered, a vendor will hardly be safe in trusting to a condition which is not so framed as to put the purchaser in possession of all the truth in relation to the matter.

On the other hand, the purchaser may debar himself from going into the prior title, as where, in a case before the late Acts, a lessee had waived his right to inquire into the lessor's title: *Warren* v. *Richardson*, Younge, 1; *Haydon* v. *Bell*, 1 Beav. 337; or forfeited his right by reason of fraud: *Hume* v. *Pocock*, L. R., 1 Ch. A. 379.

Effect of limiting right to title.

When a purchaser is successfully precluded from making inquiry into any portion of the title, he is, it appears, in the same position as if he had bought with full notice of all that is contained in that part of the title, and of all that he might have discovered by investigating it fully. See the judgment of Lord *Romilly* in *Morland* v. *Cook*, L. R., 1 Eq. 252, at p. 266; and *Fielden* v. *Slater*, L. R., 7 Eq. 523 (*a*).

Commencement of title as to freeholds.

As a rule, and subject to the provisions above referred to, there will be no necessity in the future, upon a sale of freeholds, to make any special stipulation as to the commencement of title, except to specify the document which is to form the commencement of the title, where it is intended to re-

(*a*) So, also, where the purchaser of a lease is precluded from enquiry as to the lessor's title by the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), sect. 2, sub-sect. 1, he is nevertheless fixed with constructive notice thereof: *Patman* v. *Harland*, 17 Ch. D. 353.

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quire the purchaser to accept a title shorter than forty years. It is to be observed, however, that when the document forming the root of title is a will, it will still be necessary to prove, or to require the purchaser to assume, that the testator was seised of the property (*a*). In addition, it is essential that the deed forming the root of title be properly described (*b*).

Special conditions as to title under an exchange.

When the land sold is held under an exchange (as to which see *ante*, Vol. I. p. 65), it will usually be necessary for the vendor to protect himself against the production of both titles if the exchange operates under a common law exchange, or by way of mutual exchanges, giving right of re-entry in case of eviction; and the same rule will hold when the exchange is of charity lands under the powers of the statute 1 & 2 Geo. 4, c. 92. It will generally be necessary, when exchanges have been made under the authority of any Act of Parliament, whether public or local, to examine the Act and adapt conditions to the peculiarities of each case, in many cases it being needful to obtain the consents or approval of certain persons. See notes to Vol. I. p. 519 *et seq.*

Special conditions as to title under an award.

It will be requisite, where the lands sold are held under an award, to guard against the necessity to produce the title to the property under which it was made, and also to prevent any proof being required of the regularity and validity of the award: Dart, V. & P. 164. And see *Casamajor* v. *Strode*, 2 My. & K. 706; *Cattell* v. *Corrall*, 4 Y. & C., Ex. 228. But this is not necessary where the award is made in pursuance of the General Inclosure Act, 6 & 7 Will. 4, c. 115; or the Act 3 & 4 Vict. c. 31. Nor is it always necessary to deal with the enrolment of the award, as that may be cured under 17 & 18 Vict. c. 97, which empowers the commissioners to extend the time for enrolment. Notice should also be taken in the conditions of any reservations or

(*a*) The Conveyancing and Law of Property Act, 1881, s. 3, sub-s. (3), does not apparently oblige a purchaser to assume the seisin of a testator where the title commences with a will.

(*b*) As to what is a good root of title, see Vol. I. p. 52 *et seq.*

liabilities which the Act, under which the award is made, reserves out of or imposes upon the land dealt with: see *Duke of Buccleugh* v. *Wakefield*, L. R., 4 H. L. 377; as such reservations may operate greatly to the detriment of the property sold. See also *Gill* v. *Dickinson*, 5 Q. B. D. 159. Preparation of Conditions.

In the case of property held under grant from the Crown (as to which see *ante*, Vol. I. p. 57), it will be necessary for the vendor to protect himself by condition from being bound to produce the original Crown grant. Grant from Crown.

It is now no longer necessary, on the sale of enfranchised copyholds, except with a view to precluding a purchaser from making use of evidence obtained *aliunde*, to provide that he shall not ask for the production of the title of the manor, to show that the lord was entitled to enfranchise. See Vol. I. p. 74; and see *Re Agg-Gardiner*, 25 Ch. D. 600. Enfranchised copyholds.

But when the property is copyhold and was formerly waste of the manor, it is still requisite to preclude the purchaser from requiring any proof that there was in the manor a custom for the lord to grant the waste to hold by copy: for new copyholds cannot, in the absence of special custom, be created, and even in such case it would appear that the consent of the homage is necessary: *Lord Northwick* v. *Stanway*, 3 Bos. & P. 347; *Revell* v. *Jodrell*, 2 T. R. 415; *Burlcott* v. *Winmill*, 2 Camp. 261; *R.* v. *Inhabitants of Warblington*, 1 T. R. 421. And see *Earl Cowley* v. *Wellesley*, L. R., 1 Eq. 656; *R.* v. *Hornchurch*, 2 B. & A. 189; *R.* v. *Wilby*, 2 Man. & S. 504. Waste of manor.

Strips of land by the roadside are by presumption part of the property of the adjoining owner, and are in such cases of the same tenure and title as the land to which they are contiguous: *Steel* v. *Prickett*, 2 Stark. 463; *Doe* v. *Pearsey*, 7 B. & C. 304; *Goodtitle* v. *Alker*, 1 Beav. 133; *Salisbury* v. *Great Western Railway Co.*, 17 Q. B. 840. This presumption, however, may be rebutted: *Doe* v. *Kemp*, 2 Bing. N. C. 102; *Brownlow* v. *Tomlinson*, 1 Man. & G. 488; *Scoones* v. *Maule*, 1 Beav. 251; *R.* v. *Hatfield*, 4 A. & E. 156. Frequently, however, such strips are parcel of the waste of the manor, and must be dealt Strips of land.

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with accordingly: *Dendy* v. *Simpson*, 18 C. B. 83. See *ante*, Vol. I. p. 69.

Encroachments.

Encroachments are held in fee simple, subject only to this, that when they are made by a tenant, they enure to the benefit of the landowner subject to the leasehold interest: *Doe* v. *Jones*, 15 M. & W. 580; *Kingsmill* v. *Millard*, 11 Ex. 313; *White* v. *Wakley*, 4 Jur., N. S. 988; *Lisburne* v. *Hailes*, L. R., 1 C. P. 259; *Jones* v. *Clifford*, 3 Ch. D. 779. See *ante*, Vol. I. p. 69, as to encroachments on the waste of a manor.

Leaseholds.

By the operation of the Vendor and Purchaser Act, 1874, s. 2, and of the Conveyancing and Law of Property Act, 1882, s. 3, sub-s. 3, and s. 13, sub-s. 1, of the Conveyancing Act, 1882, s. 4 (as to which see *ante*, Vol. I. p. 61), the necessity of producing the title to the freehold reversion, or to the leasehold reversion, or when the lease is made under a power, the production of any preliminary contract, is obviated. But apparently it will still be necessary to preclude the purchaser from any objection to such title or contract taken on the ground of information obtained elsewhere.

Production of original lease necessary.

A lessee who is selling must still, in the absence of stipulation, produce the original lease, no matter how ancient it may be; and when necessary this liability must be guarded against. See *Frend* v. *Buckley*, L. R., 5 Q. B. 213, *ante*, Vol. I. p. 59.

Special conditions as to title. Renewable leaseholds.

When the lease which is being sold is a renewable lease, it will be necessary to protect the vendor against having to produce the prior lease, if, as is usually the case, the lease states that it is granted in consideration of the surrender of the prior lease. See *ante*, Vol. I. p. 59.

Leaseholds for lives.

So where the property is leasehold for lives, the vendor should be prepared with proof that the *cestuis que vie* are alive, and that their ages are correctly represented, or guard himself by the use of appropriate conditions. This liability will not be the less though there be a covenant for perpetual renewal: *Anderson* v. *Higgins*, 1 J. & Lat. 718. See, however, 6 Will. 4, c. 20, ss. 2 and 9, as to the effect of recitals in certain renewed ecclesiastical leases, of the old lease, and of the deaths of the *cestuis que vie*, and so forth.

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In some cases the nature of the subject-matter of the sale itself precludes the purchaser from requiring any title. Thus, the purchaser of the benefit of an agreement for a proposed lease cannot require the production of the lessee's title: *Baxter* v. *Conolly*, 1 Jac. & W. 576; nor can the purchaser of a contract for sale require his vendor to produce the original vendor's title: *Kintrea* v. *Preston*, 1 H. & N. 357; though the contract for sale in such cases may be vitiated in the description of the subject-matter: *Brewer* v. *Broadwood*, 22 Ch. D. 105. So also where the contract is not strictly a contract for sale and purchase, but a compromise of doubtful rights: *Godson* v. *Turner*, 15 Beav. 46; *Richardson* v. *Eyton*, 2 De G., M. & G. 79, 88.

When nature of property precludes right to call for title.

Flaws in title subsequent to commencement.

When there is any flaw in the title during the period subsequent to the commencement which the vendor desires not to be compelled to remedy, on the ground of expense or otherwise, he should protect himself by a condition framed to meet the case, for the purchaser's right is to have a perfect title properly verified and proved by suitable evidence from the commencement of the title to the day of completion.

What are defects of title.

There is, however, no occasion to provide by condition against those matters which are not regarded as defects in title. Incumbrances, which can be paid off by the vendor at or before the completion of the purchase, are not considered to be defects in title: *Townsend* v. *Champernowne*, 1 Y. & J. 449; *Magennis* v. *Fallon*, 2 Moll. 285; and that although the abstract discloses incumbrances to a larger amount than the purchase-money; for as between himself and the purchaser the vendor is bound to clear off all incumbrances: *Att.-Gen.* v. *Cox*, 3 H. L. C. 240. But the title will be bad if the incumbrancer cannot be brought in and paid off: *Page* v. *Adam*, 4 Beav. 269; or if the person whose consent is required is a stranger whom the vendor cannot control: *Lewin* v. *Guest*, 1 Russ. 325; *Magennis* v. *Fallon*, 2 Moll. 583; and against such cases the vendor must protect himself by conditions. Again, although the purchaser is entitled to the legal as

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well as the equitable estate, the vendor will show a good title if it appears that the legal estate is vested in trustees for him; and he will be bound to get it in: *Crop* v. *Norton*, 2 Atk. 74; *Costigan* v. *Hastler*, 2 Sch. & L. 160; *Berkeley* v. *Dauh*, 16 Ves. 380; *Sellick* v. *Trevor*, 11 M. & W. 728; *Avarne* v. *Brown*, 14 Sim. 303; *Keogh* v. *Keogh*, 13 Ir. Eq. R. 284. This rule holds good, it seems, even where the legal estate is outstanding in a lunatic; Sugd. V. & P. 353, or in an infant. The vendor is required, in the absence of condition, to point out in whom the legal estate is vested: *Wynne* v. *Griffith*, 1 Russ. 283.

Verification of abstract.

Verification of the Abstract.]—It is the rule that the vendor must produce the original title deeds and other instruments necessary to verify his abstract, and, as the vendor is presumed to have the title deeds in his own possession, he was formerly obliged to do so at his own expense: *Berry* v. *Young*, 2 Esp. 640, n.; and this rule was not affected by the fact that he had no more than a covenant for their production, for he was bound to make use of the covenant in order to enable him to fulfil his duty in this respect: *Rippingall* v. *Lloyd*, 2 Nev. & M. 410. It was incumbent upon him to produce them either at his own place of abode or in the immediate neighbourhood of the estate, or in London; and in such cases the purchaser paid for all necessary journeys for the purpose of examining them. If the deeds were produced in London, a town agent had, except in special circumstances, to be employed: *Alsop* v. *Lord Oxford*, 1 M. & K. 566; *In re Tryon*, 7 Beav. 496. So, also, it was held in *Hughes* v. *Wynne*, 8 Sim. 85, that where the deeds were not in the actual custody of the vendor, all costs which were attributable to this state of affairs ought to be borne by the vendor. The burden thus thrown upon a vendor was in many cases very heavy, and the liability to these costs was usually transferred to the purchaser by a condition providing that the cost of production of deeds and documents not in the actual possession of the vendor,

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for the purpose of verifying the abstract, should be borne by the purchaser.

Statutory condition as to production of deeds.

This condition is now, by the Conveyancing and Law of Property Act, 1881, s. 3, sub-s. (6) (*c*), made applicable to all sales of property made since the commencement of the Act, so that the necessity for inserting the stipulation has ceased. The statutory condition seems to be sufficiently wide to cover most cases (*d*) to which such conditions are intended to apply, and in all probability it will generally be found to be sufficient for all proper purposes.

Recitals to be evidence.

The use of conditions requiring the purchaser to accept the recitals of deeds more than twenty years old, as being conclusive evidence of everything stated, noticed, assumed, or implied therein, was occasioned by the desire to save the vendor the expense of procuring the formal evidence of facts, such as births, marriages, and deaths, and the like, the proof of which though technically necessary was practically of small value to the purchaser. Except when it is made a matter of agreement that recitals shall be accepted as evidence they are not evidence as against any one except those persons who executed the deed in which they are contained and those who claim under them: *Fort* v. *Clark*, 1 Russ. 601. The recitals in a private Act of Parliament are not evidence of the facts therein stated; for it is not the practice to submit the evidence in support of private bills to the judges for their report: *Shrewsbury Peerage case*, 7 H. L. C. 1. And see also *Cowell* v. *Chambers*, 21 Beav. 619; *Moulton* v. *Edmunds*, 1 De G., F. & J. 246. In the case of ecclesiastical leases the statute 6 Will. 4, c. 20,

(*c*) See *ante*, p. 635. Upon a sale under an open contract of a building lease containing a covenant by the lessee to complete the buildings to the satisfaction of the lessor's surveyor, the purchaser was held to be entitled to the production of the surveyor's certificate at the expense of the vendor, notwithstanding this sub-section: *Moody* to *Yates*, 33 W. R. 362.

(*d*) Having regard to the decision in the case of *Re Johnson and Tustin* (28 Ch. D. 84), the statutory condition seems to extend to cases other than those aimed at by the condition in its old form: see *ante*, p. 655.

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ss. 2 and 9, provides that in certain cases the recitals in renewed ecclesiastical leases of the old lease, and of the deaths of the *cestuis que vie*, shall be conclusive evidence thereof. But with these exceptions recitals are not generally available as evidence.

How far recitals are evidence.

Even in cases where recitals would otherwise be evidence, they are not so except so far as the statements therein contained are direct and clear. An ambiguous recital is not evidence: *Kerney* v. *Browne*, 3 Ridg. P. C. 512; see *Neesom* v. *Clarkson*, 2 Ha. at p. 175; and where the condition was that recitals were to be evidence of matters recited or stated therein, it was held that matters of inference were not within the scope of the condition: *Buchanan* v. *Poppleton*, 4 C. B., N. S. 40. The ordinary condition also appears not to extend to make matters contained in sub-recitals evidence: Dart, V. & P. 147.

How far recitals conclusive on points of law.

It may be doubted, also, considering the rigour with which restrictive conditions of sale are construed as against the vendor, whether, unless the language of the condition clearly expressed such an intention, it would be extended to bind the purchaser to accept recitals as evidence of conclusions of law. For example, under a condition that all recitals of facts and matters of pedigree, in deeds twenty years old or upwards, should be sufficient evidence of the facts and matters recited, a purchaser would not be bound to accept a mere recital that J. S. was the heir-at-law of E. T., as evidence of that fact, which, it will be observed, is something more than a matter of pedigree, being a conclusion of law, often not of easy determination, from circumstances which alone are strictly matters of pedigree; for, under the same pedigree, J. S. may be the heir-at-law of E. T. as to one estate, and not his heir as to another. The proper construction of a condition making recitals evidence of the facts and matters recited, would seem to be, that the recitals must state every fact and matter which, in the absence of such a condition, counsel advising on the title would require to be stated on the abstract, and to be proved, in order to enable him to draw the re-

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quired conclusion. When it is considered how very seldom a recital of an heirship, unless it be of the simplest character (as that A. was the eldest son of B.), contains a complete statement of the pedigree and other matters necessary to support such a conclusion, the expediency of framing conditions of this nature in a more special manner than is usual will be apparent: *Goold* v. *White*, Kay, 683.

The statutory condition as to recitals, &c.

A condition on this point, nearly corresponding with the common condition, is now, when not expressly excluded, incorporated by statute in every contract for the sale of land made since 31st December, 1874. See Vendor and Purchaser Act, 1874, sect. 2, *ante*, p. 633. The statutory condition is, however, not so wide as that in common use in that it does not extend to make matters of inference contained in recitals evidence. In addition, it appears, at first sight, as if the phrase, "sufficient evidence," were not so stringent as the old form, "conclusive evidence;" but probably the terms would be held to be equivalent. The old form of condition, even though the stronger words were used, was held in *Drysdale* v. *Mace*, 5 De G., M. & G. 103, not to preclude a purchaser from showing *aliunde* that the facts were not in accordance with the recitals, and the statutory condition, being qualified by the use of the words "unless and except so far as they shall be proved to be inaccurate," would still less prevent the purchaser from proving the inaccuracy of any recital, which, if accurate, would be binding. It is, moreover, conceived that no form of words, however stringent, would be permitted to have the effect of compelling the purchaser to act upon the assumption that a recital, the inaccuracy of which he is able to prove, is a true representation of the facts. The province of the condition is merely to prevent the purchaser from requiring the vendor to prove the truth of the facts stated; not to preclude him from questioning their accuracy if he has grounds for so doing.

Bolton v. *London School Board*.

In the case of *Bolton* v. *London School Board*, 7 Ch. D. 766, it was held that a recital in a deed

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twenty years old that the vendor was seised in fee simple was sufficient evidence of that statement so as to preclude the purchaser from requiring any prior abstract. This decision has been much questioned. It appears to conflict with sect. 1 of the Vendor and Purchaser Act, 1874, which gives a purchaser a right, in the absence of stipulation, to a forty years' title, and to a proper abstract of that title (*e*). It is difficult to understand how such a recital could be "proved to be inaccurate," as it does not allege a fact, but affirms a conclusion of law; and the effect of this decision seems to be to deprive a purchaser of his statutory right to a forty years' title in all cases where a recital of seisin occurs in a deed twenty years old.

On sale of leaseholds that covenants, &c. have been duly performed.

It is usual, and even necessary, to provide, on the occasion of the sale of leaseholds, that the due performance, or effectual waiver of any breach of the covenants and conditions of the lease shall be proved by some specified evidence. Generally the receipt for the last payment of rent is fixed upon; but when the rent is a ground-rent, and particularly when the rent is purely nominal, the purchaser is sometimes required to accept the fact of possession as sufficient evidence. It was held that the condition fixed the purchaser with notice of possible breaches prior to the date of the contract, which, however, he was bound to assume had been waived: *Howell* v. *Kightley*, 21 Beav. 331. And consider *Ringer to Thompson*, 51 L. J., Ch. 42; 45 L. T. 580. The condition, in the ordinary form, did not extend to cover breaches committed by the vendor between the date of the contract and of completion: *Howell* v. *Kightley*, 21 Beav. 331; *Palmer* v. *Goren*, 25 L. J., N. S. 841. And the purchaser must himself look to all breaches after the day fixed for completion: *Dowson* v. *Soloman*, 1 Drew. & S. 1. The condition apparently was sufficient, where the breach was of a continuing nature, to preclude the purchaser from objecting that the lease had been forfeited by a breach which

(*e*) See, however, *Re Johnson and Tustin*, 28 Ch. D. 84, stated *ante*, p. 655. See also tit. ABSTRACTS, Vol. I. p. 53.

was still going on at the date of the contract, as in *Bull* v. *Hutchens*, 32 Beav. 615, where the lease was forfeited by reason of dilapidations which were not repaired at the date of the contract. So in *Laurie* v. *Lees*, 14 Ch. D. 249, it was apparently held that, though the breach was a continuing one, the purchaser was bound by the condition not to object. The statutory conditions upon this point contained in the Conveyancing and Law of Property Act, 1881, sect. 3, sub-ss. (4) and (5), *ante*, p. 634, extend the protecting power of the last receipt for rent, so as to cover breaches happening before the "date of actual completion of the purchase," *i. e.* (as is apprehended), the actual payment of the purchase-money and execution of the assignment. But the statutory condition does not deal with the cases above mentioned, in which possession is to be sufficient evidence of the performance of covenants and conditions. In these instances, the old form of condition will still have to be used (*f*).

Statutory condition.

It is also apprehended that no condition, much less the statutory condition, which is not to apply if the contrary appears, will be effectual to prevent objection by the purchaser on the ground of breaches of covenant, in cases in which there has been any misrepresentation or concealment upon a material point. Thus, in *Nouaille* v. *Flight*, 7 Beav. 521, where there was a misrepresentation as to a covenant to build, it was held that the purchaser was not bound by a condition of this nature. It seems probable that the condition would not protect a vendor from inquiry or objection in respect of breaches known to him, and not disclosed to the purchaser; and in this matter, as in all others, any taint of fraud or misrepresentation will render the condition nugatory.

Condition no protection where any misrepresentation or concealment.

The covenant which is most usually broken is that relating to fire insurance. If there is in existence a proper insurance, and there is no more than a past breach, it appears that the breach will be relieved

Breach of covenant to insure.

(*f*) In the case of *Moody* to *Yates* (33 W. R. 362), it was decided that the statutory condition contained in sub-sect. (4) of sect. 3 of the Conveyancing and Law of Property Act, 1881 (*ante*, p. 634), does not extend to the case of a peppercorn rent.

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against, and the statutory condition will suffice. But if there be no insurance, or if the insurance be not in accordance with the terms of the lease, it is doubtful if the condition will meet the case: *Howell* v. *Kightley*, 21 Beav. 331; *Wilson* v. *Wilson*, 14 C. B. 616; *Job* v. *Banister*, 2 K. & J. 374. The relief against a breach of this covenant, in the case of a *bonâ fide* purchaser, was specially provided for by sect. 8 of Lord St. Leonards' Act, 22 & 23 Vict. c. 35; but by sect. 14, sub-sect. (8), of the Conveyancing and Law of Property Act, 1881, this section is repealed; and the case of forfeiture for a breach of a covenant to insure now falls within sub-sects. (1) and (2) of the same section, whereby provision is made for restricting the right of, and relieving against, re-entry or forfeiture for a breach of any covenant or condition in a lease. Having regard to the fact that no time is limited within which the lessor is to serve upon the lessee the statutory notice before proceeding to enforce a right of re-entry or forfeiture, it seems that the difficulty of determining what are the breaches in respect of which the lessor intends to enforce his rights is not materially diminished. It must, however, be regarded as certain that no vendor would be at liberty, after receiving such a notice, to sell without disclosing the fact to the purchaser. And it is conceived that a vendor would not be able to compel a purchaser to rely upon the relief which the Court is empowered to grant. See *Turner* v. *Marriott*, cit. Dart, V. & P. 170, which was a case under Lord St. Leonards' Act.

When title to give receipt for rent may be required to be shown.

It appears, also, from the last-mentioned case of *Turner* v. *Marriott*, that where a vendor relies upon a waiver, whether express or covered by a condition, and the landlord giving the receipt for the rent is not the original lessor, a condition precluding the investigation of the lessee's title will not prevent the purchaser from requiring the vendor to trace the title from the original lessor to such landlord: Dart, V. & P. 171. In such cases it was, and it is conceived still is, necessary to provide by condition that no objection shall be taken in respect of the title of the person giving such receipt for rent.

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Stamps, registration, &c.

It will be prudent in most cases to make use of a condition that no objection shall be taken on the ground that any deed or document which forms part of the title is unstamped or insufficiently stamped, or that it is not registered, or has not been properly registered; the condition should provide that if any purchaser shall desire to have any defects in these respects remedied, he shall bear the costs of complying with his wishes. If these provisions be not inserted, the vendor may be compelled to incur comparatively heavy costs. Similar stipulations should also be employed with reference to enrolment of deeds and other formalities of a like nature, provided that the formality in question is not essential to the validity of the deed or document.

So, also, when the property is in lease, it should be seen that the agreements are properly stamped, or a condition should be used providing against any objection founded upon the absence or insufficiency of a stamp.

Identity of parcels.

Evidence of Identity of Parcels.]—It frequently happens, owing to the changes made in the boundaries of lands and fences of fields, and the alterations in names and other landmarks, that it becomes difficult, after the lapse of a few years, to trace the connection of the land held under the title deeds with the description of land in the parcels of the deeds. This is particularly the case in those neighbourhoods where building operations are in progress; for when a large estate is split up into small lots and laid out with roads and other improvements, those natural features upon which the old descriptions of the property were based become obliterated. In these cases it is necessary to make use of conditions providing against requisitions in respect of defects of evidence of identity, or for requiring the purchaser to accept certain specified evidence as sufficient. Conditions of this nature are, however, intended only to supply deficiencies in evidence, and cannot, at all events in the ordinary forms, be used to provide for cases in

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which such evidence as there is, is not consistent with itself, or where there is no evidence at all: *Curling* v. *Austin*, 2 Dr. & S. 129. In that case the condition was that "the purchaser is not to require any further proof of the identity of the property than is furnished by the title deeds themselves," which was held to be in effect a contract that the title deeds should show identity. So where the condition provided that no further evidence of identity of the parcels should be required than was afforded by the deeds, instruments, and other documents abstracted, and the descriptions on the various documents were inconsistent with each other, it was held that further evidence might be required: *Flower* v. *Hartopp*, 6 Beav. 476. The purchaser is also entitled, in the absence of express stipulation, to have distinguished the precise plots of land which are held under the different descriptions: *Flower* v. *Hartopp*, 6 Beav. 476; *Robinson* v. *Musgrove*, 2 Moo. & R. 92. So, also, when the land sold is of intermixed tenure, and the ordinary condition is used, the purchaser appears to be entitled to have the boundaries of the lands held under the different tenures pointed out to him: *Monro* v. *Taylor*, 8 Hare, 51; 3 Mac. & G. 713; *Dawson* v. *Brinckman*, 3 Mac. & G. 53; 3 De G. & S. 385; *Cross* v. *Lawrence*, 9 Hare, 462. In such cases it is well to provide that the vendor shall not be required to distinguish the lands of different tenures, and a condition of this kind will bind the purchaser even in a case in which, owing to its operation, and the consequent impossibility of distinguishing between freeholds and copyholds, he was unable to cut timber for which he had paid: *Cross* v. *Lawrence*, 9 Ha. 462; *Cross* v. *Keane*, 9 Ha. 468. But in the case of copyholds, indefiniteness and vagueness of description are unimportant, provided that it can be shown that the property has actually been held under the description: *Long* v. *Collier*, 4 Russ. 267.

Evidence of identity.

To meet the exigencies of such cases as those referred to, recourse may be had to such evidence as is afforded by old plans or maps, or extracts from parish or land-tax books, or old receipts for

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rent, or entries in account books by a deceased steward: *Parry* v. *Hindle*, 2 Taun. 180; *Barry* v. *Bebbington*, 4 T. R. 515. But the most usual course is to require the purchaser to accept statutory declarations that the land has been held under the description offered for as long a period as the facts will allow. It will often be necessary to provide that no objection shall be raised because the descriptions of the property contained in the deeds cannot be reconciled with one another.

There is a distinction between a statement of acreage in the particulars and a condition requiring that "the estate, as to the extent of acreage and other matters of description, shall be taken as conclusively shown and defined by the said deeds of conveyance and leases without further evidence," which was held to be a mere conveyancing condition as to identity, and insufficient to estop the purchaser from complaining of a misrepresentation as to acreage in the particulars: *Aberaman Iron Works* v. *Wickens*, L. R., 4 Ch. A. 101.

Statutory declaration.

It is frequently convenient to have recourse to statutory declarations as evidence of matters other than identity of parcels when it is difficult or impossible to procure evidence of a better and more satisfactory nature. When it is intended that the purchaser shall be satisfied with evidence of this nature, the fact should be stated in the conditions, which should also specify the person by whom the declaration has been or is to be made, who should be a thoroughly competent person: *Nott* v. *Riccard*, 21 Beav. 307; and provision should be made for the death, refusal, or incapacity of the proposed declarant. Declarations of this kind are specially useful in proving the identity of the property sold; but care must be taken that the declaration, when made, shall effectually meet the difficulty: Dart, V. & P. 148, 149.

Rule between vendor and purchaser as to fixtures.

As to Fixtures, Timber, Crops, &c.]—Where on a sale of a house it is intended that the purchaser shall pay for fixtures, this should always be expressed; for it should seem, that, whatever would descend to

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the heir, as being fixed to the freehold, would pass to a purchaser with the house, the general rule, regulating what are fixtures, being that which obtains between the real and personal representatives, and not that which prevails between landlords and tenants, which is an exception to the general doctrine, founded on the convenience of trade. In a case, therefore, where a house was sold without any stipulation as to fixtures, it was held, that the vendor could not afterwards claim any compensation for stoves, cooling coppers, mash-tubs, water-tubs, blinds, &c., which were in the house: *Colegrave* v. *Dios Santos*, 2 B. & C. 76; 3 D. & Ry. 255. And see *Hitchman* v. *Walton*, 4 M. & W. 409; *Higginson* v. *Clowes*, 15 Ves. 516; *Beck* v. *Rebow*, 1 P. Wms. 94; *Ex parte Quincy*, 1 Atk. 477; *Mather* v. *Fraser*, 2 K. & J. 536. The question in regard to fixtures seldom arises where the premises are in the actual possession of a tenant; for, in that case, all that do not belong to the tenant, and those only, would pass with the house; and the conditions should expressly state that the tenant's fixtures alone will be sold (*g*). As to what are fixtures, see Dart, V. & P. 535. It will usually be found convenient, upon the sale of a house, to have

(*g*) As notice of a tenancy is notice of the terms of it, see *Daniels* v. *Davison*, 16 Ves. 249, the purchaser would probably be considered as bound to inquire what fixtures belonged to the tenant; though, if he were entitled by special contract to more than ordinary tenant's fixtures, it would be more safe, and certainly more fair, in the vendor to state the fact. Indeed, it may be observed generally, that, if the purchaser be apprised of the property being tenanted, he ought, for his own security, to inform himself of the nature of the contract with the tenant, by a perusal of a copy or abstract of the lease or agreement by which he holds; or otherwise to require some notice to be taken of the terms of the tenancy in the contract for sale. Unless one of these precautions be taken, the purchaser, under the rule above adverted to, would be subject to any claims which might be set up by the tenant, by virtue of his lease from, or agreement with, the vendor, without being entitled to any compensation from the vendor on account of the nature of those claims, unless they were made the subject of distinct representation on the part of the latter. Of course, these observations do not apply to an *expired* tenancy, as where the property is described as *late* in the occupation, or *late* the residence of A.: *Miles* v. *Langley*, 1 Russ. & M. 39.

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an inventory of the fixtures made and deposited for the inspection of intending purchasers; reference being made to it upon the sale. As to the withdrawal of fixtures from a sale, see *Ex parte Bagshaw, re Ker*, 13 Ch. D. 304.

Timber.

So also timber, as well as all other trees, pass, in the absence of express stipulation, with the freehold, and, therefore, if timber (*h*) is to be paid for by the purchaser the conditions should provide for such payment. The conditions should be precise, for where land was sold in several lots and the particulars stated that the timber on two of the lots was to be valued and paid for, but said nothing as to the timber on the other lots, it was held that, notwithstanding a general condition that "all timber and timberlike trees down to 1*s.* a stick inclusive, should be taken at a valuation," the purchasers of the lots, to which the particulars did not expressly affix the special qualification, were entitled to the timber thereon without payment: *Higginson* v. *Clowes*, 15 Ves. 516; and there must be no misrepresentation: *Lord Brooke* v. *Rounthwaite*, 5 Ha. 298. If the condition be properly drawn it will bind the purchaser, even though, by reason of a condition relieving the vendor from the necessity of distinguishing between freeholds and copyholds, it be uncertain whether the purchaser would be able to cut any timber at all upon the lots purchased: *Crosse* v. *Lawrence*, 9 Ha. 462; and in another case at the same sale it was held that this was so even though the whole of the lots purchased being copyhold, the purchaser was

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What is timber.

(*h*) "Oak, ash, and elme, these be timber trees in all plans:" Co. Litt. 53 a. But other trees may also be regarded as timber by the custom of the particular districts, such as beach, hornbeam, whitethorn and blackthorn, and even some fruit trees, such as walnut and chestnut: *Duke of Chandos* v. *Talbot*, 2 P. Wms. 606; see also *Honywood* v. *Honywood*, L. R., 18 Eq. 306. No trees, however, are timber until they are of twenty years' growth: *Foster* v. *Lennard*, Cro. Eliz. 1. As a general rule, pollards would not seem to be timber; but they may be timber by the custom of the country, if sound: see Dart, V. & P. 122. A grant of timber and timber-like trees includes ordinary and customary timber, and also all "proper thinnings:" *Gordon* v. *Woodford*, 27 Beav. 603.

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certainly unable to cut any: *Crosse* v. *Keane*, 9 Ha. 469. This rule would, however, appear not to hold when the contracts for the purchase of the timber and land are separable.

Crops.

On a sale of agricultural land it is often advisable to insert a condition that the purchaser shall take and pay for growing crops at a valuation, and also any allowances in respect of manure, seeds, &c., which have to be made in accordance with any local custom; for the usage that an incoming tenant shall look to the outgoing tenant for payment is a mere matter of convenience; the landlord is liable for the amount: *Bradburn* v. *Foley*, 3 C. P. D. 129.

Mode of valuation.

Where the conditions provide that the valuation of fixtures, &c. shall be taken in any particular manner, the prescribed formalities must be strictly observed. The Court can give no relief if the persons named as valuers do not make their award; the contract is in such a case not complete, and there is nothing on which the Court can act: *Milnes* v. *Gery*, 14 Ves. 400; *Vickers* v. *Vickers*, L. R., 4 Eq. 529.

Agreement to sell at a valuation.

It would seem that a general agreement to sell "at a fair valuation" is capable of being enforced, and the conditions should provide that in case the valuation should not be taken in the prescribed manner, the fixtures, &c. shall be taken at their fair value. See Dart, V. & P. 207; see also *Cooth* v. *Jackson*, 6 Ves. 134; *Darby* v. *Whitaker*, 4 Drew. 134; *Morgan* v. *Milman*, 3 De G., M. & G. 24; *Wilkes* v. *Davis*, 3 Mar. 507; *Pritchard* v. *Ovey*, 1 Jac. & W. 396; *Price* v. *Assheton*, 1 Y. & C., Ex. 82; *Cannon* v. *Fuchs*, 14 C. B. 181. As to what is a fair valuation, see *Cumberland* v. *Bowes*, 3 C. & R. 149. A valuation is not an arbitration within the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125)(*i*), sect. 12: *Collins* v. *Collins*, 26 Beav. 306. See also, *Bos* v. *Helsham*, L. R., 2 Ex. 72; *Turner* v. *Goulden*, L. R., 9 C. P. 57. But it may be brought within the Act if any question for determination should

(*i*) See *ante*, tit. Arbitration, p. 102.

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arise between the parties: *Re Hopper*, L. R., 2 Q. B. 372: *Re Anglo-Italian Bank*, L. R., 2 Q. B. 452.

Trustees may not sell timber apart from the inheritance: *Cockerell* v. *Cholmeley*, 1 Russ. & M. 418; *Buckley* v. *Howell*, 29 Beav. 546. They may, however, be specially authorized so to do by the instrument creating their trust, or by the sanction of the Court. See 25 & 26 Vict. c. 108, and *post*, p. 731.

Rentcharge.

Where land, which is subject to a rentcharge or fee farm rent, is sold in lots, the rentcharge may be apportioned, upon an application to the Inclosure Commissioners, with the concurrence of the owner of the charge under the Inclosure Acts: see stat. 17 & 18 Vict. c. 97, ss. 10—14; or the portion of the estate to be sold may be released under stat. 22 & 23 Vict. c. 35, without discharging the remainder of the estate. If, however, the owner of the rentcharge declines to concur in such application, it will be necessary to frame a condition requiring each purchaser to pay a specified portion of the rentcharge, and also to obtain an apportionment, if he desire it, at his own cost.

Rent on sale of reversion.

Where an estate in reversion expectant on the determination of a lease, is sold in lots, due provision must be made for the apportionment of the rent receivable from the tenant under the lease. Rent service is apportionable under *Quia Emptores*, 18 Edw. 1, c. 1, either by the verdict of a jury or with the consent of the tenant; or it can be apportioned by the Inclosure Commissioners, upon an application by the persons interested both in the reversion and in the rent. The tenant is not bound by an apportionment made without his consent, unless by the verdict of a jury, and may require it to be so made: *Bliss* v. *Collins*, 1 B. & Al. 876. Nor will an apportionment be presumed as against a purchaser even from twenty years payment of the alleged apportioned rent: *Barnewell* v. *Harris*, 1 Taun. 430; *ante*, Vol. I. p. 95; *Taylor* v. *Martindale*, 1 Y. & C. C. C. 658. If, therefore, the consent of the tenant cannot be obtained, it will be necessary to provide for the case by condi-

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tion: *Walter* v. *Maunde*, 1 Jac. & W. 183. Notwithstanding that case, in which it was held that the purchaser was bound by a statement of the apportioned rent to be paid in respect of his purchase, and that he could not complain that he would not have full powers of entry, &c. (as to which now see stat. 22 & 23 Vict. c. 35, s. 3), it will be prudent to require the purchaser to make no objection on the ground that the tenant's consent has not been obtained to the apportionment, and that his concurrence shall not be insisted on.

Tithe, and land tax.

The apportionment of tithe rentcharge can be effected under the Act 6 & 7 Will. 4, c. 71, s. 58; but it is usual to insert a condition requiring that the vendor shall not be required to secure the apportionment of the tithe rentcharge. The same course is usually adopted with respect to land tax, which is apportionable under the stat. 38 Geo. 3, c. 60, where lands which have been rated together are severed.

Rent on sale of leaseholds in lots.

Where leaseholds held under a single lease are sold in lots, it becomes necessary to apportion the rents and liabilities. This operation increases the trouble of collecting the rents, and tends to diminish the security; therefore the lessor is seldom likely to assent to any apportionment. There are three plans which are adopted to meet the difficulty:—first, cross powers of distress and entry are given to the purchasers of each lot on the other lots, a process which becomes complicated if the lots be numerous; secondly, the whole of the rent and liability is thrown upon the purchaser of one lot, as in *Walter* v. *Maunde*, 1 Jac. & W. 181, where the particulars of sale stated that the property was held upon a lease, subject to a ground rent, the whole of which was to be borne by the purchaser of one lot, and it was held that a purchaser of another lot could not refuse to complete, because of the liability to which he would be subject of having his estate forfeited by the default of a third party. The third plan is for the lease to be retained by the vendor or assigned to trustees or to the largest purchaser, the vendor or trustees or such purchaser granting underleases for

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the whole term, less one day, to the other purchasers, who execute counterparts of their leases, and covenant to indemnify their lessor against their proportion of the rents and covenants in the original lease. The same considerations apply, but with even more force, to the other liabilities to which leaseholds are subject. For instance, when the lease comprises buildings which are subject to a covenant to insure in a fixed sum: *Brown* v. *Paull*, 2 Jur., N. S. 317. If the concurrence of the lessor can be obtained (which is sometimes the case with regard to leaseholds held under a corporation, or under individuals who know themselves to have a perfectly indefeasible title), the simplest and best course is that the original lease should be surrendered, and that the lessor should grant fresh leases to the several purchasers. Whatever plan be adopted it should be set forth in the conditions.

Sale of life policy.

Upon a sale of a policy of life assurance, unless it is otherwise stipulated, the vendor must be prepared to show that the statements in the policy as to the health of the person on whose life the policy has been granted were in accordance with the facts; that the age is correctly set forth; and that nothing has since been done or occurred to vitiate the policy. If the policy should be granted upon the life of a person other than the assured, it will be necessary also to show that the interest of the assured in the life was an insurable interest within the stat. 14 Geo. 3, c. 48, and that such interest is still subsisting.

Easements, &c.

It is customary to employ a condition stating that the property is sold subject to all rights and easements affecting it. The effect of this condition is only to provide that the purchaser shall take the property subject to any rights to which it was subject, as against the vendor. For instance, where two lots, one of which was supplied with water from the other, were put up to auction, and bought by the respective tenants, it was held that the purchaser of the first lot had no easement as against the second lot, notwithstanding a condition that each lot was sold subject to all rights of way and water and other ease-

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ments (if any) subsisting thereon: *Russell* v. *Harford*, L. R., 2 Eq. 507. See also *Daniel* v. *Anderson*, 8 Jur., N. S. 328; *Suffield* v. *Brown*, 4 De G., J. & S. 185. And compare *Bolton* v. *Bolton*, 11 Ch. D. 968, and *Wheeldon* v. *Burrows*, 12 Ch. D. 31. But a purchaser of one of several lots should make inquiries so as to ascertain whether the effect of the sale is to create any right of way of necessity over the property bought by him, for such a right may be reserved, or may pass without specific words: *Pennington* v. *Galland*, 1 C. & R. 819. The condition should be used with caution by trustee-vendors: *Dunn* v. *Flood*, 33 W. R. 315.

It is conceived that the condition does not relieve the vendor from his liability to disclose any rent or easement affecting the property of which he is aware; unless, indeed, such burden be of the nature of a patent defect: see *ante*, p. 614; but will only operate to protect him if it should subsequently appear that a third person had some right over the property of which he was not aware at the time of the sale. See, however, and consider *Manson* v. *Thacker*, 7 Ch. D. 620.

Succession duty.

In cases where it is necessary, as, for instance, upon the sale of a reversion, or where succession duty which has not been paid or will become payable is charged upon the estate, the conditions should specify what provision is to be made for payment of it (*j*).

Dower.

It may be advisable, when the title to freeholds is intended to be made through a person who was of an age to have been married before the 1st of January, 1834, when Dower Act (3 & 4 Will. 4, c. 105) came into operation, or through an intestate, to require a purchaser to assume that no such person has a wife or

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has left a widow entitled to dower. Gavelkind lands are within the Dower Act: *Farley* v. *Bonham*, 2 J. & H. 177. But the Act does not extend to freebench in copyholds or customaryholds: *Powdrell* v. *James*, 2 Sm. & G. 407; *Smith* v. *Adams*, 18 Beav. 499. A

(*j*) In the absence of stipulation to the contrary the purchaser of a reversion is liable to pay the succession duty: *Cooper* v. *Trewby*, 28 Beav. 194.

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similar condition will, therefore, be necessary when the custom of the manor is that a widow shall have freebench out of all lands of which her husband was seised during the coverture, and in any event it may be prudent to adopt the condition in order to escape the necessity of being compelled to prove the custom of the manor in this respect.

Compensation generally.

As to Compensation.]—Although, until the enactment of Lord Cairns' Act (21 & 22 Vict. c. 27), specific performance was the only remedy in equity for the non-performance of a contract: *Todd* v. *Gee*, 17 Ves. 273; *Sainsbury* v. *Jones*, 5 My. & C. 1; *Williams* v. *Higden*, 1 C. P. C. 500; the Court has always, in the exercise of its inherent jurisdiction, awarded compensation where, by reason of mistake or other cause, a contract was capable of no more than partial completion. This practice of granting relief to the injured party grew up as ancillary to the right to damages in a Court of law: *Newham* v. *May*, 13 Price, 749; *Blore* v. *Sutton*, 14 Ves. 128; *Todd* v. *Gee*, 17 Ves. 273; *Gwillim* v. *Stone*, 3 Mer. 237. But, although "the equitable jurisdiction to award relief by way of damages is, apparently, not enlarged by the Judicature Act, 1873 (36 & 37 Vict. c. 66)," yet "the probable result of the working of the Act will be that, in all actions for specific performance, where the plaintiff fails to make out a case for the primary relief, the Chancery Division of the High Court will award him such damages as he would be entitled to recover in an action for breach of contract; and that, in granting this secondary relief, mere technicalities in the form of the proceeding will be disregarded:" Dart, V. & P. 14th ed. p. 984.

The Court, however, awards compensation only in those cases in which there is no very substantial departure from the terms of the contract, and when, by requiring the payment of a sum of money by the one or the other, the parties to a contract can be practically put in the same position as if the contract had been executed in its entirety. See *Drewe* v. *Hanson*, 6 Ves. 675; *Halsey* v. *Grant*, 13 Ves.

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73; *Horniblow* v. *Shirley*, 13 Ves. 81. It is, therefore, as a rule, only where the variation is small in importance that any compensation is allowed. See *Mortlock* v. *Buller*, 10 Ves. 306, 316, and cases cited, *post*. In particular, compensation, properly so called, is not awarded in respect of defects of title: *Williams* v. *Higden*, 1 C. P. C. 500; *Mawson* v. *Fletcher*, L. R., 6 Ch. A. 91.

Vendor's duty as to description of the estate.

The vendor's duty, in making preparation for a sale, being to acquaint himself thoroughly with the nature, qualities, and conditions of the property he is about to sell, it has always been difficult for him to obtain compensation for any misdescription or mistake. Formerly the Courts were more lenient to him in this respect than they are at the present time; for the cases referred to in the judgment in *Drewe* v. *Hanson*, 6 Ves. 675, even if they are there rightly described (as to which see 1 Bro. C. C. 440, notes, and *ante*, p. 624), would not now be followed. The principle which has been acted upon for a long period appears to be that the vendor, being in possession of the estate, and able to make all necessary investigations into it, shall not be allowed to take advantage of his own negligence and carelessness; but that the purchaser, having no means of acquainting himself with the subject-matter of the sale except those which the vendor allows to him, is entitled not only to be relieved from his contract entirely, but, if he desire, to have given to him that which the vendor has it in his power to give, with an abatement, if necessary. This rule seems to be applicable as well when there is a condition making provision for compensation as when there is none.

Vendor's rights where no condition.

It follows that the vendor cannot compel the purchaser to accept the property sold to him unless it substantially agrees with and satisfies the description under which it was sold. For instance, the purchaser will be relieved from his contract when a portion of the estate is wanting, that portion being either material in respect of quantity or important with regard to the use and occupation of the property. Thus, in *Portman* v. *Mill*, 2 Russ.

574, a considerable part of the estate was not to be had: in *Perkins* v. *Ede*, 16 Beav. 193, the portion to which no title was shown was necessary for the proper enjoyment of the property. See also *Peers* v. *Lambert*, 7 Beav. 546; *Knatchbull* v. *Grueber*, 1 Mad. 167; *Re Arnold*, *Arnold* v. *Arnold*, 14 Ch. D. 270. **Preparation of Conditions.**

Again, a misdescription in respect of tenure will be fatal to the vendor's right to enforce partial specific performance of his contract, as in *Fordyce* v. *Ford*, 4 Bro. C. C. 494. Misrepresentation of a fraudulent nature of course deprives the vendor of any right of the kind.

But when the vendor has not been at fault, and the purchaser was negligent, the vendor can compel the carrying out of a contract without any allowance, as in the case of patent defects, and similar matters. Thus, in *Dyer* v. *Hargrave*, 10 Ves. 505, no compensation was allowed to a purchaser by reason of a misrepresentation to the effect that the lands sold were enclosed in a ring fence, it being held that he must be taken to have notice of the facts. So in *Grant* v. *Munt*, G. Coop. 173; *Barraud* v. *Archer*, 2 Sim. 433. These cases appear, however, to be explainable upon the ground that the purchaser ought to have known, and must be taken to have been aware, that he was buying a property in a certain condition or subject to certain charges. Vendor compelling performance without compensation.

When, however, the defect is not of importance, and the purchaser gets substantially that for which he bargained, the Court will compel him to accept the property with an abatement. Thus, where the portion of the property to which no title could be shown was immaterial: *Calcraft* v. *Roebuck*, 1 Ves. jun. 224; *M'Queen* v. *Farquhar*, 11 Ves. 467; *King* v. *Wilson*, 6 Beav. 124. And see *Scott* v. *Hanson*, 1 Russ. & M. 128, with respect to the two acres which did not fairly come within the description of water meadow. So where there was a misrepresentation as to the profits of a business: *Powell* v. *Elliott*, L. R., 10 Ch. A. 424. See also *Howland* v. *Norris*, 1 Cox, 59, where a misdescription of a right of common appendant to the property sold was held to be matter for compensation. Where vendor able to compel performance with allowance.

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Thus, those incumbrances which, like tithes, land tax, quit-rents and rent-charges, are not mere matter of conveyance (although apparently a quit-rent was formerly held at law to constitute a fatal defect: *Turner* v. *Beaurain*, Sugd. 312), are, if of small amount, held to be matter for compensation: *Esdaile* v. *Stephenson*, 1 Sim. & St. 122; *Portman* v. *Mill*, 1 Russ. & M. 696; *Prendergast* v. *Eyre*, 2 Hag. 81. But if the amount be considerable, the purchaser will be able to avoid the contract: *Wood* v. *Bernal*, 19 Ves. 221. And see Lord *St. Leonards*' remarks on *Howland* v. *Norris*, 1 Cox, 59; Sugd. V. & P. 313.

Land-tax, quit-rents, &c.

Tithes.

Tithes also would seem to be matter of compensation: see *Halsey* v. *Grant*, 13 Ves. 73; *Horniblow* v. *Shirley*, 13 Ves. 81; unless, indeed, the object of the purchaser was to obtain an estate which should be tithe-free: *Bincks* v. *Lord Rokeby*, 2 Swanst. 222; *Smith* v. *Tolcher*, 4 Russ. 282.

Repair.

The condition of the property, as regards repair, appears to be matter of compensation in equity: *Dyer* v. *Hargrave*, 10 Ves. 505; *Grant* v. *Munt*, G. Coop. 177.

Rights of common, &c.

Rights of common, and similar rights, are, as a rule, fatal to a contract if not disclosed; but, in an anonymous case, cited in Sugd. V. & P. 393, it was held that a right of common, which was not likely to be enforced, was sufficiently immaterial to be disregarded. This case seems, however, to be questionable: see Mr. Dart's remarks thereon, V. & P. 1105.

Dower.

In one case, *Wilson* v. *Williams*, 3 Jur., N. S. 810, where a wife declined to join in a conveyance, and release her right to dower, the right to dower was treated as a matter of compensation; but in that case the purchaser was willing that it should be so dealt with. Seeing that a widow's right to dower is not a mere money demand, but is a right to have a certain portion of every part of the real estate affected by it set out in specie for her use (see *Doe* v. *Gwinnell*, 1 Q. B. 682; *Thompson* v. *Burra*, L. R., 16 Eq. 592), it is at least doubtful whether the purchaser could have been compelled to accept compensation.

Purchaser's rights in absence of condition.

The right of the purchaser is very different. He is entitled to elect to take the subject-matter

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of the sale, or so much of it as the vendor can convey to him, with an abatement in respect of so much of it as the vendor is unable to give him: *Mortlock* v. *Buller*, 10 Ves. 316. In that case it was ruled that a vendor who has only a partial interest cannot profess to sell the whole, and then avoid the contract on the ground that he has not the entirety: and the same principle applies to the property as well as to the interest in the property. See also *Hughes* v. *Jones*, 3 De G., F. & J. 315. Therefore, when a purchaser is willing to take the estate with compensation, the vendor is not allowed to rescind the contract, unless under very special circumstances: *Duke of Norfolk* v. *Worthy*, 1 Camp. 337; *Newby* v. *Painter*, 10 Ha. 704.

This right of the purchaser to take with compensation, in respect of a deficiency in quantity, exists notwithstanding that the estate was not sold at a price according to admeasurement: *Hill* v. *Buckley*, 17 Ves. 194; for, when a defined quantity is sold, it must be taken that the price was fixed with regard to the quantity sold. See also *King* v. *Wilson*, 6 Beav. 124.

Compensation for deficiency in the interest in the property.

This right has been enforced not only in regard to the area of the estate but also as to the extent of the interest therein. See *Cleaton* v. *Gower*, Finch, 164; *Lord Bolingbroke's case*, cit. 1 Sch. & Lef. 19; *Dyas* v. *Cruise*, 2 J. & Lat. 460; *Dale* v. *Lister*, 16 Ves. 7; *Milligan* v. *Cooke*, 16 Ves. 11; *Nelthorpe* v. *Holgate*, 1 Coll. 203; *Neale* v. *M'Kenzie*, 1 Keen, 474; *Hanbury* v. *Litchfield*, 2 Myl. & K. 629; *Barnes* v. *Wood*, L. R., 8 Eq. 424. See also *Mortlock* v. *Buller*, 10 Ves. 315. In the case of *Thomas* v. *Dering*, 1 Keen, 729, Lord *Langdale* refused to compel a tenant for life, with remainder to his first and other sons in tail, with remainder to himself in fee, who had contracted to sell the fee simple, to convey his life estate and remainder in fee with an abatement. In a subsequent case, *Graham* v. *Oliver*, 3 Beav. at p. 128, the same learned judge refers, apparently with misgiving, to this decision; and having regard to the other cases cited above, and to Lord *St. Leonards'* comments (Sugd. V. & P. 308), the decision appears

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to be of questionable validity at the present time. In the case of *Castle* v. *Wilkinson*, L. R., 5 Ch. 534, there were present other considerations which appear to have disentitled the purchaser to the relief which he sought. Compare also the case of *Wilson* v. *Williams*, 3 Jur., N. S. 810, mentioned *ante*, p. 694.

Where undivided share only can be conveyed.

Where the defect in title affects only an undivided share of the estate contracted to be sold, the rights of the parties are generally the same as if there was a deficiency of a portion of the estate. Thus, it is not in the power of a vendor, who contracts to sell the whole, but can make title only to an undivided share, to force a purchaser to accept that which he can convey, with an abatement: *Att.-Gen.* v. *Day*, 1 Ves. 218, 224. The purchaser is entitled to take the undivided share with compensation, though his right to do so has only been recently established. In *Wheatley* v. *Slade*, 4 Sim. 126, *Shadwell*, V.-C., refused to compel a vendor, who, having only nine-sixteenths of a property, had contracted to sell the whole, to convey at a lower price the undivided shares which he possessed. In that case the property was a lace manufactory, and the shares of the vendor were subject to a charge amounting to nearly the whole of the purchase-money. This decision has not been followed in subsequent cases. It is true that the same Vice-Chancellor, decreeing specific performance with abatement in a case, *Jones* v. *Evans*, 12 Jur. 466, where vendors who had only four-twentieths had contracted to sell ten-sixths of certain leaseholds, drew a distinction between the case before him and cases "where the parties contract to sell the whole, but can only sell a part." This distinction appears at first sight to be supported by the case of *Maw* v. *Topham*, 19 Beav. 576, where a vendor who had contracted to sell the whole, could make a title to three-fourths only. In that case, however, as in *Wheatley* v. *Slade*, other considerations, relating to the fact that trust-moneys to a larger amount than the abated purchase-money were secured upon the vendor's shares, complicated the question. The result of subsequent cases appears to be that it makes no difference whether a vendor who is entitled only to

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undivided shares contracts to sell the entirety or an undivided share only: *Hooper* v. *Smart*, L. R., 18 Eq. 683; *Horrocks* v. *Rigby*, 9 Ch. D. 183. See also *Price* v. *Griffith*, 1 De G., M. & G. 80; *Reynell* v. *Sprye*, 1 De G., M. & G. 660; *Barrow* v. *Scammell*, 19 Ch. D. 175; and *English* v. *Murray*, 49 L. T. 35; 32 W. R. 84. And there seems to be no reason, apart from considerations of hardship (*k*), or the policy of the Court in refusing to enforce a contract involving a breach of trust (as to which see *post*, pp. 704, 729), why a purchaser should not be entitled, if he chooses to accept the position of a co-owner of property, to compel the execution of such a contract on the terms of an abatement; for the other owners of the property can have no right in ordinary cases to prevent a co-owner from disposing of his shares.

Compensation as to easements, &c.

Similarly, although a purchaser cannot be compelled to accept compensation in respect of rights of common, or easements of which he had no notice, or of other rights of third parties and liabilities attaching to the property: *Seaman* v. *Vawdrey*, 16 Ves. 390; *Martin* v. *Cotter*, 3 J. & Lat. 496; *Hayford* v. *Criddle*, 22 Beav. 480; *Pretty* v. *Solly*, 26 Beav. 606; *Upperton* v. *Nickolson*, L. R., 6 Ch. 436; *Shackleton* v. *Sutcliffe*, 1 De G. & S. 609; *Burnell* v. *Brown*, 1 Jac. & W. 172; *Forteblow* v. *Shirley*, 2 Swanst. 223; *Larkin* v. *Lord Rosse*, 10 Ir. Eq. 70; yet if the purchaser choose he can insist upon having the property with an abatement in respect of the right: *Seaman* v. *Vawdrey*, 16 Ves. 390; *Martin* v. *Cotter*, 3 J. & L. 496. And see *Smithson* v. *Powell*, 20 L. T. 104; *Ramsden* v. *Powell*, 4 Jur., N. S. 200; and compare *Peacock* v. *Penson*, 11 Beav. 355. As to compensation in respect of an unreleased right to dower, see *ante*, p. 694.

Conditions as to compensation.

The result of the cases above quoted being that in the event of any error or misstatement getting into the particulars without the knowledge or in spite of the care of the vendor, he is, in most cases,

(*k*) As, for instance, when to compel a vendor specifically to perform his contract would be to compel him to commit a breach of covenant: *Wilmott* v *Barber*, 15 Ch. D. 96.

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at the mercy of the purchaser, who may usually either refuse to carry out the contract, or insist upon compensation, it is prudent and customary for the vendor to protect himself against the consequences of errors and misdescriptions by means of conditions of a more or less stringent character. The most usual form of condition is that which provides that any misdescription, mistake, or error in the particulars, whether in the vendor's favour or against him, shall not avoid the contract, but shall be the subject for compensation, such compensation to be allowed to or given by the purchaser, as the case may require. The condition sometimes provides only that the compensation shall be allowed to the purchaser. A more frequent and more stringent form of the condition stipulates not only shall the contract not be avoided by, but that no compensation shall be allowed in respect of any error or misdescription. When the condition provides that there shall be an allowance of compensation, it frequently goes on to prescribe the mode in which the compensation shall be assessed, specifying arbitration or a reference to some particular person. It was suggested by *Kelly*, C. B., in the case of *Bos* v. *Helsham*, L. R., 2 Ex. 72, that it might be well, when compensation is provided for, to limit it to mistakes discovered before the execution of the conveyance; and this is sometimes done, possibly with advantage. See *post*, p. 702.

Trustees not allowed to give compensation.

Fiduciary vendors are not allowed to give any compensation in respect of their own mistakes: *White* v. *Cuddon*, 8 Cl. & F. 766, and therefore trustees are not justified in acting upon clauses of this kind, even if they insert one in the conditions of sale; but the usual practice is, upon sales by trustees, to provide that there shall be no compensation given or accepted. The same rule does not apply to a mortgagee. See further as to this matter, *infra*, p. 729.

When the estate is larger than described.

When the vendor's mistake is against himself, and the actual quantity of the estate exceeds that stated in the conditions, and there is no stipulation in the

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contract, the purchaser will have the option of avoiding the contract or of taking the conveyance in the form intended by the vendor. The Court will not however interfere unless the parties can be put in the same position as if the contract had not been executed, nor unless the party aggrieved comes speedily for redress: *Harris* v. *Pepperell*, L. R., 5 Eq. 1. In this case the mistake was discovered three months after execution of the conveyance.

Where purchaser bound to take more than he bargained for.

The purchaser may, however, bind himself by his contract to take the entire estate and pay the higher price; though it would probably be necessary for the vendor to make out a clear case as to his mistake, in order to obtain any compensation. See *Martin* v. *Cotter*, 3 J. & Lat. 496; *Higginson* v. *Clowes*, 15 Ves. 516, 525; and *Leslie* v. *Tompson*, 9 Ha. 273. In the last-mentioned case, where there was in the description of one lot an error against the vendor, and in the description of another a mistake in his favour, both lots having been bought by the same purchaser, the Court applied the condition as to compensation in both cases, and made the purchaser (who seems not to have been an unwilling purchaser) pay compensation as well as accept it. And see *Paynter* v. *Newby*, 17 Jur. 483; *S. C.* 11 Ha. 26.

In the case of *Price* v. *North*, 2 Y. & C., Ex. 620 (which seems, however, to have been decided partly upon the ground of delay and laches in applying for relief), a claim for compensation by the vendor for an excess of the area of the estate over the description was dismissed with costs, though the alleged error was serious. But in *Lethbridge* v. *Kirkman*, 25 L. J., Q. B., N. S. 89, the mistake against the purchaser being trivial, was held to be within the condition. See also the cases of *Att.-Gen.* v. *Sitwell*, 1 Y. & C. Ex. 559; *Townshend* v. *Stangroom*, 6 Ves. 328; and *Alvanley* v. *Kinnaird*, 2 Mac. & G. 1. It seems likely that in the case of a serious misdescription the Court would not, on the one hand, compel a vendor to sell more than he supposed himself to be selling unless at an adequately increased price, nor, on the other hand, force a purchaser to take a

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conveyance of a larger estate than he had contracted to buy, and to pay a larger amount than he had calculated upon. See Sugd. V. & P. 320. But a vendor may so bind himself by his contract as to be compelled to accept the price fixed, even when the area turns out to be much larger than was supposed, as in the case of *Walker* v. *Burnett*, cited in Dart, V. & P. 647, where the vendor in effect contracted that he was not to have any compensation in the event of an error; and the Court compelled him, without increase in price, to convey an estate containing eighteen acres, though it had been sold under the supposition that it contained less than ten acres.

Rights of vendor under conditions as to compensation.

Where conditions of this kind are sought to be enforced by the vendor, it is held that those forms of the condition which provide for compensation apply only to cases where the misdescription is slight and the error unimportant. No condition will be of any service to the vendor where the error is of such magnitude as to amount in the estimation of the Court to a fraudulent misrepresentation.

Where vendor not allowed to enforce the condition:—cases of misdescription.

Thus, the condition does not apply where the thing sold turns out to be of a different nature from that contracted to be sold; as where, in *Ayles* v. *Cox*, 16 Beav. 23, the misdescription had regard to the tenure of the property sold. See also *Fenton* v. *Brown*, 14 Ves. 144; *Madeley* v. *Booth*, 2 De G. & S. 718; *Law* v. *Urlwin*, 16 Sim. 377; (but see *Darlington* v. *Hamilton*, Kay, 550, and *Camberwell, &c. Building Society* v. *Holloway*, 13 Ch. D. 754;) *Stewart* v. *Alliston*, 1 Mer. 26; *Evans* v. *Robins*, 10 Jur., N. S. 473; *Upperton* v. *Nickolson*, L. R., 6 Ch. A. 436; *Weston* v. *Savage*, 10 Ch. D. 736. But, in *Price* v. *Macaulay*, 2 De G., M. & G. 339, where the condition extended to a misdescription of tenure, and the difference between the tenure as described and as it actually was, was found to be insignificant, the vendor was allowed to insist upon the purchaser completing with compensation. But this is not so where the property does not in any way correspond with the description: *Leach* v. *Mullett*, 3 Car. & P. 115; or where a material part of the estate as described is non-

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existent, or cannot be found: *Att.-Gen.* v. *Day*, 1 Ves. 218; *Robinson* v. *Musgrove*, 2 Moo. & R. 92; *Roffey* v. *Shallcross*, 4 Mad. 227; *Dalby* v. *Pullen*, 3 Sim. 29; *Casamajor* v. *Strode*, 2 My. & K. 727; or where the title to it is defective: *Dobell* v. *Hutchinson*, 2 A. & E. 355. Nor will the vendor be able to avail himself of the condition where the misrepresentation was with respect to a matter material to the proper enjoyment or user of the property, or valuable to the purchaser, having regard to the purpose for which he entered into the contract. Thus, in cases such as those already referred to, where there was concealed a covenant against carrying on certain trades, or where rights of other persons or easements materially interfering with the intended user of the property were not properly disclosed, the vendor cannot compel completion with compensation. See *Flight* v. *Booth*, 1 Bing., N. C. 370; *Stapylton* v. *Scott*, 13 Ves. 426; *Vignolles* v. *Bowen*, 12 Ir. Eq. 196; *Dykes* v. *Blake*, 4 Bing., N. C. 463; *Gibson* v. *d'Este*, 2 Y. & C. C. C. 542; *Pope* v. *Garland*, 4 Y. & C., Ex. 403; *Perkins* v. *Ede*, 16 Beav. 193; *Shackleton* v. *Sutcliffe*, 1 De G. & S. 609; *Price* v. *Macaulay*, 2 De G., M. & G. 339; *Denne* v. *Light*, 3 Jur., N. S. 627; *Denny* v. *Hancock*, L. R., 6 Ch. A. 1; *Re Arnold*, *Arnold* v. *Arnold*, 14 Ch. D. 270; *Brett* v. *Clowser*, 5 C. P. D. 376; *Brewer* v. *Brown*, 28 Ch. D. 309. Nor will the vendor be assisted where he has been guilty of anything in the nature of a wilful misrepresentation; as in *Duke of Norfolk* v. *Worthy*, 1 Camp. 338; *Stewart* v. *Alliston*, 1 Mer. 26; *Pulsford* v. *Richards*, 17 Beav. 95; *Price* v. *Macaulay*, 2 De G., M. & G. 339; *Lachlan* v. *Reynolds*, Kay, 52; *Dimmock* v. *Hallett*, L. R., 2 Ch. A. 21; *Phillips* v. *Caldcleugh*, L. R., 4 Q. B. 159.

Where amount of compensation cannot be computed.

Nor will the Court allow the vendor to insist upon specific performance with abatement where the deficiency of the estate from the description is of such a nature that the money value of it cannot be ascertained. For instance, in *Lord Brooke* v. *Rounthwaite*, 5 Ha. 298, there was a clause which contained a misstatement as to the average size of the timber on the estate, but there being no representation as to

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the number of trees, the data were insufficient for arriving at the purchaser's loss. Similarly, in the cases of ornamental timber: *Magennis* v. *Fallon*, 2 Moll. 561; *Cox* v. *Coventon*, 31 Beav. 578; *Denny* v. *Hancock*, L. R., 6 Ch. A. 1. Compare also *White* v. *Cudden*, 8 Cl. & F. 766; *Sherwood* v. *Robins*, 3 Car. & P. 339; 1 Moo. & Malk. 194.

Even when the more stringent form of condition is used, providing that no compensation shall be given or allowed, the Courts have held that it refers to small and trivial errors only, and have refused to apply it so as to permit a vendor to force upon the purchaser a property which was materially deficient in any important particular. Thus, in *Lethbridge* v. *Kirkman*, 25 L. J., Q. B., N. S. 372, where the error, which was in the vendor's favour, was not large, it was held to come within the condition. It is true that in *Nicoll* v. *Chambers*, 11 C. B. 996, where this condition was used, and the land was described as containing 1a. 2r. 8p., whereas its actual area was only 3r. 24p., the purchaser was held bound to complete without compensation. In *Cordingley* v. *Cheeseborough*, 8 Jur., N. S. 585, 755, where the purchaser under this condition insisted upon specific performance with compensation, the defect being very large, it was decided that if he were allowed to complete his purchase it must be upon the terms of payment of the whole purchase-money; but Lord *Westbury*, in his judgment on the appeal, expressed his opinion that the vendor would not in such a case be allowed to take advantage of a condition which was intended to cover only trivial misdescriptions. This view of the condition has since been acted upon; for in the case of *Whittemore* v. *Whittemore*, L. R., 8 Eq. 603, the vendor seeking specific performance in a similar case was compelled to allow compensation.

Purchaser's rights under conditions as to compensation.

In effect the value of the more stringent condition to vendors seems to be, that in the case of those misdescriptions which are intended to be covered by it, they will be able to insist upon completion without compensation in accordance with the spirit of the condition; while in cases where the error is of a

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more serious nature, the purchaser will be allowed to enforce specific performance only upon the terms of payment of the whole purchase-money.

With this exception, however, the rights which a purchaser acquires under the usual conditions with regard to compensation are in addition to and enlargement of the rights which he has already in the absence of express stipulation, a liberal construction being put upon provisions which are in favour of the purchaser, and all conditions restrictive of his right being strictly construed as against the vendor. See *Paynter* v. *Newby*, 11 Ha. 26.

Where right of purchaser does not arise or is negatived.

The right of the purchaser to compensation may, however, under certain circumstances, be barred. Thus, if the purchaser, who proposes to avail himself of a defect in the property offered to him, was at the time when he entered into the contract aware, whether by reason of actual or constructive notice, of the deficiency in question, he will not be allowed to recover any compensation. For instance, where the notice of the defect was actual; as in *Laurenson* v. *Butler*, 1 Sch. & Lef. 13; *Harnett* v. *Yielding*, 2 Sch. & Lef. 549; *Nelthorpe* v. *Holgate*, 1 Col. 203; *Maw* v. *Topham*, 16 Beav. 576; *Castle* v. *Wilkinson*, L. R., 5 Ch. 534. See also *Wilson* v. *Williams*, 3 Jur., N. S. 810; and *Barker* v. *Cox*, 3 Ch. D. 359; *S. C.*, 4 Ch. D. 464. See, however, *Lett* v. *Randall*, 49 L. T. 71, where, the misrepresentation being as to the date at which a reversion on a ground rent would fall in, the purchaser was held to be entitled to compensation under the condition, whether he was or was not aware of the mistake. But where the purchaser is taken to have knowledge, by reason of the notoriety of the matter either as being part of public or local law, or as being matter of common knowledge in the locality, he cannot recover: as in *Morris* v. *Preston*, 7 Ves. 557, where the purchaser of a lease was held to have been aware of an Act of Parliament which rendered the lease invalid; so in *Edwards-Wood* v. *Marjoribanks*, 7 H. L. C. 806, where the purchaser of an advowson was fixed with notice of a loan from the Queen Anne's Bounty; and

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compare the cases of notice of the terms of a lease, such as *James* v. *Litchfield*, L. R., 9 Eq. 51, and also those of patent defect, such as *Oldfield* v. *Round*, 5 Ves. 508, as to which see *supra*, p. 614. But the Court will not impute to a purchaser, even though he be a tenant in actual occupation, knowledge of the measurements or area of the property so as to prevent him from enforcing a claim to compensation: *Winch* v. *Winchester*, 1 Ves. & B. 375; *Shackleton* v. *Sutcliffe*, 1 De G. & S. 609; *King* v. *Wilson*, 6 Beav. 124.

Purchaser not allowed compensation when rights of third parties interfered with.

Again, a purchaser will not be allowed to insist upon his right to compensation, when the granting of this kind of partial specific performance would interfere with the rights of third parties. See *Thomas* v. *Dering*, 1 Keen, 729; and *Graham* v. *Oliver*, 3 Beav. 124. So also where it would be unreasonable to enforce it, because it would lead to hardship. The decisions in *Wheatley* v. *Slade*, 4 Sim. 126, and *Maw* v. *Topham*, 19 Beav. 576, may be explained as cases in which the vendor would have been hardly dealt with if he had been compelled to complete and to give compensation. Compare the cases of *Price* v. *North*, 2 Y. & C., Ex. 620, and *Earl of Durham* v. *Legard*, 34 Beav. 611; the cases of mutual mistake, such as *Baxendale* v. *Seale*, 19 Beav. 601; and the cases where the Court refuses to compel trustees to complete on such terms, such as *White* v. *Cuddon*, 8 Cl. & F. 766.

Again, the right may be destroyed by the exercise of another provision of the contract; as, where the vendor is able to meet the claim by insisting upon rescission under the conditions. This was the case in *Williams* v. *Edwards*, 2 Sim. 78, where the conditions provided that, if the purchaser's counsel should be of opinion that a good title could not be made, the contract should not stand. The purchaser's counsel was of opinion that there was a title to two-thirds only; and it was held that the condition prevented the purchaser from insisting upon a conveyance of the two-thirds with an abatement. See also *Mawson* v. *Fletcher*, L. R., 6 Ch. A. 91.

A misrepresentation by the purchaser, on the faith of which the vendor entered into the contract, will, of course, be fatal to the purchaser's claim to compensation: *Clermont* v. *Tasburgh*, 1 Jac. & W. 112.

Where amount of compensation difficult or impossible of estimation.

The loss for which the purchaser seeks compensation must also be capable of estimation, or the Court cannot give him his decree. Thus in *Sherwood* v. *Robins*, Moo. & Malk. 194, it was held that the difference in value between a reversion expectant on the death, without children, of a man aged sixty-four, and of a man aged sixty-six, was not capable of being calculated. In *Lord Brooke* v. *Rounthwaite*, 5 Ha. 298, where the particulars misstated the average size of the timber trees on the estate, but contained no representation as to their number, it was held that the Court could not measure the amount of the deficiency. Neither will the Court, as a rule, assess the comparative values of the covenants of different persons. This was done in the case of *Milligan* v. *Cooke*, 16 Ves. 11, where a term was sold with the benefit of covenants for renewal, which were not absolute, but bound only a contingent portion of the covenantor's assets. But in *Ridgway* v. *Gray*, 1 Mac. & G. 109, the Court declined to estimate the difference in value between property in the occupation of two persons as lessees, and the same property in the occupation of a single assign of the original lessee. See also *Grissell* v. *Peto*, 2 Sm. & G. 39; *Farebrother* v. *Gibson*, 1 De G. & J. 603; *Nouaille* v. *Flight*, 7 Beav. 521; *Hughes* v. *Jones*, 3 De G., F. & J. 307; and *Smithson* v. *Powell*, 20 L. T. 104. So also in *White* v. *Cuddon*, 8 Cl. & F. 766, it was intimated that the compensation sought would have had to be refused, if on no other ground, because of the impossibility of estimating the difference in value between arbitrary and certain fines of a manor. The Court will not, however, readily regard the difficulty of computing compensation as insuperable. See *Westmacott* v. *Robins*, 4 De G., F. & J. 390, and *Ramsden* v. *Hirst*, 4 Jur., N. S. 200.

But the purchaser is not precluded from obtain-

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ing compensation by a condition which provides merely that he shall not "object to complete his purchase" if the property turns out less than that stated in the particulars: *Frost* v. *Brewer*, 3 Jur. 165.

How compensation is computed.

When the misdescription complained of is in respect of acreage, the abatement will be in proportion to the deficiency, even though the sale be not by the acre: *Hill* v. *Buckley*, 17 Ves. 394. Where a tender for a lease for 249 acres was taken to be a tender for 235 acres only, and accepted on that basis, and the actual area offered was only 214 acres, it was held that the rent for the 214 acres must be reduced in the proportion of 214 to 235: *M'Kenzie* v. *Hesketh*, 7 Ch. D. 675. In *Powell* v. *Elliott*, L. R., 10 Ch. A. 424, the Court made an assessment of compensation in respect of a misrepresentation of the profits of a colliery.

Where error discovered after conveyance.

It sometimes happens that a defect either in title, or in the subject-matter of the estate, is discovered after the conveyance is completed and executed. It appears that where this is so, the right of the purchaser to obtain relief is materially affected by the consideration whether the contract under which he bought did or did not contain a condition providing for the payment of compensation in respect of errors or misdescriptions. If there was no such condition, then it is conceived that the purchaser can be relieved only upon the ground of fraud, or of mistake common to both parties. But if there was such a condition, and if the condition extended, both as regards the nature of the misrepresentation and the time of its discovery, to cover the error complained of, the purchaser is entitled to compensation, notwithstanding that he has taken his conveyance.

Where fraud is not proved.

In the case of *Thomas* v. *Powell*, 2 Cox, 394, Lord *Loughborough* held that after conveyance taken, the Court will leave the vendee to such remedy as he may have under the covenants in his conveyance; and that if such covenants do not contain a warranty against the defect in question, and no fraud is proved, the purchaser is entirely without remedy.

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See also *Wakeman* v. *Duchess of Rutland*, 3 Ves. 235; *Bree* v. *Holbech*, Dougl. 656; *Browning* v. *Wright*, 2 Bos. & P. 23; *Vane* v. *Lord Bernard*, Gilb. Eq. Rep. 7, and *Sergeant Maynard's case*, Freeman, 1. A bill for compensation for a defect in rent was dismissed in *Newham* v. *May*, 13 Price, 749, "mainly" on the ground that there was not sufficient evidence of fraud to support it; with which case may be compared *Wilde* v. *Gibson*, 1 H. L. C. 605, where Lord *Campbell* points out that there is a distinction between an executory contract and an executed conveyance, and says, "with regard to the first, if there be misrepresentation or concealment, which is material to the purchaser, a Court of Equity will not compel him to complete the purchase; but where the conveyance has been executed . . . a Court of Equity will set aside the conveyance only on the ground of actual fraud;" and the purchaser having failed in proving his case, which was founded upon personal misrepresentation and fraud, the bill was dismissed. Again, in *Legge* v. *Croker*, 2 Ba. & B. 506, Lord *Manners* says that if it were a case of wilful misrepresentation, the plaintiff, who sought to set aside a lease on the ground that a right of way had, as he alleged, been misrepresented to him, might be entitled to relief; but that when the parties had expressed their meaning by a lease that had been, with due deliberation, executed, and where there was no wilful misrepresentation, nor any mistake in omitting to introduce a covenant respecting the right of way with the deed, it would be very dangerous to correct the deed.

Where fraud is proved.

On the other hand, when fraud has been proved, the Courts have ripped up the transaction, even after conveyance made. Lord *Eldon*, in *Edwards* v. *McLeay*, 2 Swanst. 287, said, "The question resolves itself into this—whether the representation made to the plaintiff was not, in the sense in which we use the term, fraudulent;" and ordered the contract to be rescinded, and the purchase-money and all costs and expenses incident to the purchase and conveyance to be repaid. Compare the anonymous case relating to copyholds

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in Freeman, p. 118. So also in *Rawlins* v. *Wickham*, 3 De G. & J. 304, the facts were held to show that there had been such a misrepresentation as entitled the plaintiff to have the contract rescinded, although there was no moral fraud proved: per *Turner*, L. J., at p. 316. Similarly, in *Hart* v. *Swaine*, 7 Ch. D. 42, it was held that the vendor, in having taken upon himself, with a view of securing a benefit to himself, to assert that the property (which was in fact copyhold) was freehold, had, in the view of a Court of Law, committed a fraud. It is to be observed that in none of the cases above noticed was there any condition for allowing compensation, the contract in each case being in this respect open.

Where there is a condition for compensation.

With regard to those cases in which there is a condition for compensation, it appears to be the law that the condition is an independent contract which does not become merged in the formal conveyance; and that when it is not confined to errors discovered before conveyance, a purchaser can avail himself of it as well after as before the execution of the conveyance. In *Cann* v. *Cann*, 3 Sim. 447, it was laid down that the question was whether, there having been a misrepresentation as to the value of the property, in respect of which the purchaser had a right of action, the circumstance of his having taken a conveyance had destroyed that right; and it was decided that the right of the purchaser was not at all affected by that circumstance. This case was followed by *Bos* v. *Helsham*, L. R., 2 Ex. 72, where it was expressly decided that the contract contained in the condition is an express and independent contract, and can be enforced whether the conveyance has been taken or not.

The next case upon the point was *Manson* v. *Thacker*, 7 Ch. D. 620, before *Malins*, V.-C. In that case a site had been sold as "available for building a warehouse or granary;" but when the purchaser, after conveyance, came to deal with it, he found that its value for the purpose indicated was materially lessened by the existence of a right of water vested in third parties, and not disclosed

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by the vendor. There was amongst the conditions the usual provision for compensation; but it was held that there had been no fraudulent misrepresentation, and therefore the action was dismissed. The same learned Vice-Chancellor subsequently decided the case of *Besley* v. *Besley*, 9 Ch. D. 103 (in which, however, there was no condition for compensation), on similar grounds. In the following year *Jessel*, M. R., had the question before him in *In re Turner & Skelton*, 13 Ch. D. 130, and followed *Cann* v. *Cann*, 3 Sim. 447. In the subsequent case of *Allen* v. *Richardson*, 13 Ch. D. 524, *Malins*, V.-C., dissented from the last-mentioned decision, and followed his own previous ruling. It is to be noted that in this case, as in *Besley* v. *Besley*, 9 Ch. D. 103, there was no condition providing for compensation. The next case in which the question was discussed was *Joliffe* v. *Baker*, 11 Q. B. D. 255, where there was no condition for compensation. The Court there held that there had been no fraud and no breach of warranty, and therefore refused to assist the purchaser. But in the last case upon the point, *Palmer* v. *Johnson*, 12 Q. B. D. 32, where the plaintiff founded his claim, first upon contract, secondly upon fraud, and the latter was negatived by the jury, *A. L. Smith*, J., who had assisted in the decision of *Joliffe* v. *Baker*, 11 Q. B. D. 255, said of that case, "The action being an action for damages, the plaintiff could only succeed if he could establish a contract with the defendant and a breach of it by him, or an actionable tort committed by the defendant whereby the plaintiff had damage," neither of which was proved; and added that he was unable to agree with that part of the judgment of *Williams*, J., in that case, which held that after conveyance a purchaser's right to sue upon his contract for compensation was gone. The case of *Palmer* v. *Johnson* was affirmed on appeal, 13 Q. B. D. 351; and the Court expressly stated that the cases of *Manson* v. *Thacker*, 7 Ch. D. 620; *Besley* v. *Besley*, 9 Ch. D. 103; and *Allen* v. *Richardson*, 13 Ch. D. 524, could not be considered to be law. The Court also re-affirmed the position laid down in *Bos* v. *Helsham*, L. R., 2

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Ex. 72, that the contract for compensation is entirely distinct, and in no way merges in the formal conveyance of the subject-matter of the sale. See also *Phelps* v. *White*, 7 L. R., Ir. 160.

Fraud.

It seems never to have been questioned but that a purchaser could recover in an action for damages for deceit or fraud, notwithstanding his conveyance, even though the conveyance contained no reference to the fraudulent matter: *Dobell* v. *Stevens*, 3 B. & C. 623; *Mummery* v. *Paul*, 1 C. B. 316; *Fuller* v. *Wilson*, 3 Q. B. 58, 68; *Joliffe* v. *Baker*, 11 Q. B. D. 255. The same doctrine is asserted by *Malins*, V.-C., in *Manson* v. *Thacker*, 7 Ch. D. 620; and the mere fact that a purchaser has a contract for compensation would not, it is conceived, preclude him from proceeding against his vendor if he had an available cause of action on the ground of fraud: cf. *Flight* v. *Booth*, 1 Bing. N. C. 370. And although it would be well in practice to limit the contract contained in the usual condition for compensation so that it shall be available only in respect of errors discovered before the execution of the conveyance, it hardly seems to follow that a purchaser, by accepting a limited right to claim compensation, which is nevertheless not a limitation, but an extension of his ordinary right in that respect, will debar himself from having his contract set aside on the ground of fraud; and, having regard to the cases of *Rawlins* v. *Wickham*, 3 De G. & J. 304, and *Hart* v. *Swaine*, 7 Ch. D. 32, it seems probable that whether there be or be not a condition constituting a contract, a misrepresentation in an important particular will suffice. See also *Newham* v. *May*, 13 Price, 749; *Nash* v. *Wooderson*, 33 W. R. 301.

Purchaser relieved after conveyance in cases of mutual mistake.

The purchaser has also been relieved of his contract, even after conveyance, when there has been a mutual mistake. In *Bingham* v. *Bingham*, 1 Ves. sen. 127 (and see Belt's Supplement, p. 81), the plaintiff had purchased his own estate. So, also, in *Cooper* v. *Phibbs*, L. R., 2 H. L. 149, the plaintiff had taken a lease of property which was his own; and in *Jones* v. *Clifford*, 3 Ch. D. 779, *Hall*, V.-C., referring to *Cooper* v. *Phibbs*, remarks "that nothing

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can be clearer than this, that Lord Cranworth recognised the principle that the Court would, even in the case of a completed contract, give relief against a common mistake in the same way as it would against fraud."

Vendor's right after conveyance.

The vendor's rights in this respect after conveyance are not extensive. He is supposed to know precisely what he is selling; and, as a rule, will be held to his bargain. Thus, in *O'Kill* v. *Whittaker*, 1 De G. & S. 83; 2 Phil. 338, on a sale of the residue of a term created by a specified deed, of which both parties thought only eight years were unexpired, there being, in fact, twenty years to run, the vendors sought to have the purchaser declared a trustee for them of the remainder of the term. Lord *Cottenham* held that he was being asked to decree specific performance of a contract with an additional term, the object of the bill being to compel the purchaser to pay additional purchase-money. See also *Malden* v. *Merrick*, 2 Atk. 8; *Marshall* v. *Collett*, 1 Y. & C., Ex. 232; *Evans* v. *Jones*, Kay, 29; and *Sturge* v. *Starr*, 2 My. & K. 195. But care should be taken to distinguish these cases, as well as those where a purchaser is merely mistaken, and not deceived, from those in which both parties are under a misapprehension; as to which see *supra*, p. 602.

Arbitration.

The condition as to compensation sometimes proceeds to specify the mode in which the amount of compensation is to be determined, as by a reference to an arbitrator or a referee. This mode of settling the matter, notwithstanding the doubt formerly expressed by Lord *Eldon*, in *Groote* v. *Tattersall*, 2 Ba. & B. 131, as to whether such an agreement was not tantamount to an exclusion of the jurisdiction of the Court, is a valid mode of dealing with it, and can be enforced: *Livingston* v. *Ralli*, 1 Jur., N. S. 594; 2 C. L. R. 1096; *Leslie* v. *Tomson*, 9 Ha. 268. The provisions of the condition, as usually drawn, do not, however, meet the case of a question arising as between two purchasers under the same conditions: *Russell* v. *Harford*, L. R., 2 Eq. 517; and see *Leslie* v. *Tomson*, 9 Ha. 268. Such a proceeding is,

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as a rule, not within the provisions of the Common Law Procedure Act, 1845, being merely a reference as to the *quantum* of compensation: *Collins* v. *Collins*, 26 Beav. 306; *Cordingley* v. *Cheeseborough*, 8 Jur., N. S. 585, 755; and it is therefore not competent to one party, upon failure by the other to appoint a referee after notice, to appoint his arbitrator such referee: *Bos* v. *Helsham*, L. R., 2 Ex. 72. Where the condition was that certain fixtures were to be taken at a valuation to be made by valuers, mutually agreed upon, and the vendor refused to appoint a valuer and to complete, it was held that the purchaser could only have specific performance without the fixtures: *Richardson* v. *Smith*, L. R., 5 Ch. A. 648.

Indemnity.

As a rule the Court will not compel either party to give or to accept an indemnity, which is practically a form of compensation: *Balmanno* v. *Lumley*, 1 V. & B. 224; *Paton* v. *Bulwer*, 1 Bli. N. S. 66. Thus in *Aylett* v. *Ashton*, 1 My. & C. 105, and *Bainbridge* v. *Kennard*, 32 Beav. 346, the Court declined to compel a vendor to give an indemnity: while in *Nouaille* v. *Flight*, 7 Beav. 521; *Ridgway* v. *Gray*, 1 Mac. & G. 109; and *Fildes* v. *Hooker*, 3 Mad. 193, the Court refused to force the purchaser to accept one. It is, however, competent to the parties to contract for the giving and receiving of an indemnity. See *Paterson* v. *Long*, 6 Beav. 590; *Roberts* v. *Small*, 1 Man. & Gr. 577.

In such cases, when an indemnity is contracted for, and is to be charged upon another estate than that which is the subject of the sale, the title to the estate to be charged must be shown: *Casamajor* v. *Strode*, 1 Wils. C. C. 428; *Cottrell* v. *Watkins*, 1 Beav. 361.

The cases in which conditions provide for an indemnity are usually those where the estate which is being sold is subject to a charge which is almost certain not to be enforced, or to restrictive covenants, where an estate subject to a lease is sold in lots, and where leaseholds held under one lease are sold in lots.

If the estate be sold subject to a charge, or to

restrictive covenants, it is probably best to state the facts clearly, and to specify the indemnity which is offered. A condition of this nature can be specifically enforced: *Walker* v. *Barnes*, 3 Mad. 247. Where it is intended to provide against charges carrying interest, annuities, and the like, it will, most likely, be necessary to take not only the covenant to indemnify, but also a covenant to pay or procure payment of the charge: Dart, V. & P. 553. Preparation of Conditions.

Conditions as to the Conveyance.]—It is usual in conditions of sale to stipulate that the purchasers shall, at their own expense, prepare such conveyances as are necessary and proper, and tender them for execution at a specified time and place; and that upon the due payment of the purchase-money, the vendor shall execute such conveyances. The condition is scarcely more than a statement of the ordinary legal rights and duties of the parties, independently of stipulation: *Prior* v. *Williams*, 1 M. & W. 6; *Stephens* v. *Medina*, 4 Q. B. 422; *Poole* v. *Hill*, 6 M. & W. 833. But the clause which usually follows and provides that a draft of the intended conveyance shall be left with the vendor's solicitors for perusal, a specified number of days before the day fixed for completion, is of considerable value where there is any reason for desiring that there should be no delay in concluding the transaction. Conveyance.

A stipulation that the purchaser shall have a conveyance at his own expense was held, in *Paramore* v. *Greenslade*, 1 Sm. & G. 541, to be insufficient to throw upon him the cost of obtaining the concurrence of necessary parties—and, in the absence of conditions bearing upon the point, the vendor is bound to bear the costs of perusal and execution by all necessary conveying parties; as, for instance, where a suit was necessary for the purpose of obtaining the concurrence of an infant, the vendor having died immediately before completion: *Midland Counties Railway Co.* v. *Westcomb*, 11 Sim. 57; *Hanson* v. *Lake*, 2 Y. & C. C. C. 328; *Farrar* v. *Winterton*, 4 Y. & C., Ex. 472; *Heard* v. *Cuthbert*, 1 Costs of obtaining concurrence of necessary parties.

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Ir. Ch. R. 369. So also where it was necessary to obtain a surrender under the Trustee Act: *Bradley* v. *Munton*, 16 Beav. 294. See also *Lake* v. *Eastern Counties Railway Co.*, 19 L. T. 323, and *Re Taylor*, 1 Mac. & G. 210.

Costs of obtaining lessor's consent.

So also, upon a sale of leaseholds, it is the duty of the vendor to obtain the assent of the lessor, if such assent be necessary, and to pay the costs of doing so: *Lloyd* v. *Crispe*, 5 Taun. 249; *Mason* v. *Corder*, 7 Taun. 9; *Wilkinson* v. *Lloyd*, 7 Q. B. 27; *Smith* v. *Capron*, 7 Ha. 185; *Ellis* v. *Rogers*, 50 L. T. 660. If, therefore, the case be so, a condition should be employed for the purpose of relieving the vendor of this liability.

Costs of matters essential to perfecting the conveyance.

The vendor must also pay for all matters essential to the perfecting of the conveyance, such as acknowledgments by married women, enrolment of disentailing deeds and the like: Sugd. V. & P. 561. But the cost of registration in counties, where registration is necessary with a view to secure priority, falls upon the purchaser; as the conveyance is complete without that precaution: Dart, V. & P. 708.

Outstanding estate or term.

A usual condition provides that the costs of getting in any outstanding legal estate or term, or procuring a surrender or release thereof, shall be borne by the purchaser. These costs would, in the absence of stipulation, have to be borne by the vendor: *Farrar* v. *Earl of Winterton*, 4 Y. & C., Ex. 472; *Williams* v. *Glenton*, L. R., 1 Ch. A. 200. Where the condition provided that the purchaser was to bear the cost of getting in the legal estate, if he considered it outstanding, it was held that the vendor was entitled to specific performance on his executing a conveyance of the equitable interest, and undertaking, at the expense of the purchaser, to obtain such conveyances, and to give such assistance for getting in the legal estate as the purchaser should require: *Sheerness W. W. Co.* v. *Polson*, 3 De G., F. & J. 36. The condition did not apply when the outstanding term was a mortgage term, even though arrangements were made for paying it off: *Stronge* v. *Hawkes*, 2 Jur., N. S. 388; the term in that case coming within the usual rule, which requires a vendor to deal with incumbrances. If, however, a purchaser chooses to keep

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an incumbrance alive for his own benefit, he is not entitled, even in the absence of stipulation, to throw the cost on the vendor: *Cooper* v. *Cartwright*, Johns. 679.

Execution of conveyance by attorney.

The vendor should, if possible, execute the conveyance, or surrender the estate in person, and not by attorney; for even though a power of attorney be given for valuable consideration, and therefore irrevocable, it is liable to be determined by the death, or to be suspended by the mental incapacity of the person who gives it: *Mitchel* v. *Neale*, 2 Ves. 679; *Noel* v. *Weston*, 6 Mad. 50; *Webb* v. *Kirby*, 7 De G., M. & G. 376; *Duke of Beaufort* v. *Glyn*, 25 L. T. 171. If, therefore, it should for any reason be desirable to have the conveyance executed by attorney, it is necessary, or at all events prudent, to insert a condition providing that no objection shall be taken to that mode of execution; and such condition should provide that an attested copy of the power of attorney may be seen at a specified place prior to the day of sale.

Rights of purchaser as to execution of conveyance.

Another point was raised in the cases of *Viney* v. *Chaplin*, 2 De G. & J. 468; *Essex* v. *Daniel*, L. R., 10 C. P. 538; and *Ex parte Swinbanks*, 11 Ch. D. 525, as to whether the purchaser was entitled to be present himself or by his agent at the execution by the vendor of the conveyance. This question has now been made the subject of legislation, for the 8th section of the Conveyancing and Law of Property Act, 1881, provides that:—

Rights of purchaser as to execution.

"(1) On a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence or in that of his solicitor as such, but shall be entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor.

"(2) This section applies only to sales made after the commencement of this Act."

It seems, therefore, that in future the purchaser may insist upon some person appointed by himself being present and attesting the execution of the conveyance by the vendor; but that if he does so, he must bear the costs thereby occasioned.

Conveyance by trustees and mortgagees.

It is usual, where the sale is being made under a trust or power for sale by trustees or mortgagees, to

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insert a condition to the effect that they shall be required to convey as trustees or mortgagees only so that they may be liable to no more than the statutory covenants against incumbrances implied by their so doing. Provided, however, that the purchaser had notice that his vendors were selling in a fiduciary capacity, as he would if they were properly described in the particulars of sale, he would not, it is conceived, be entitled to object to complete on the ground of their conveying as trustees, even though the stipulation be omitted. This condition, as usually framed, does not preclude the purchaser from acquiring limited covenants for title by an equitable tenant for life: *Re Sawyer and Baring's Contract*, 51 L. T. 356.

Concurrence of beneficiaries.

The condition sometimes adds that the concurrence of beneficiaries is not to be required. But this, it is conceived, is not a proper stipulation to insert, nor one which would be insisted upon by the vendor. If the vendor be a trustee for sale, or a mortgagee selling under a power, the condition is unnecessary; for the want of a power to give receipts is supplied by statute, and the concurrence of the beneficiaries cannot be required. But, on the other hand, though in the case of *Wilkinson* v. *Hartley*, 15 Beav. 183, such a condition was held available to preclude the purchaser from objecting to the want of power of the vendors, who were trustees, to give a receipt, yet when the sale is in virtue of the powers of the Settled Land Act, it would seem clear that it cannot be within the competency of the framers of conditions of sale to override the statute law so as to compel purchasers to dispense with a concurrence or consent, which under statute law is necessary to the validity of the sale, as, for instance, under the Settled Land Act. The condition, in fact, seems intended by indirect means to preclude the purchaser from having any valid conveyance at all.

Deeds.

Conditions as to Custody and Production of Documents, and as to Attested Copies.]—The destination of the title deeds is a subject to which the attention of a person preparing conditions of sale will necessarily be directed.

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Custody of documents of title.

The title deeds of an estate are the evidences by which its holder is enabled to defend his possession of and the title to the estate. So, before the Statute of Uses, they belonged to the feoffee to uses, to enable him to perform this duty, unless the feoffment were with warranty of title, in which case it appears that the feoffor was entitled to retain them: Co. Litt. 6 a; *Lord Buckhurst's case*, 1 Rep. 1. So absolutely do they become the property of the tenant in fee, that, according to *Gawdey*, J., in *Kelsack* v. *Nicholson*, Cro. Eliz. 496, he may give them away, and the heir, if the land descends to him, has not any remedy for them. It seems, however, hardly probable that any owner of land would prejudice the marketable value of his property in this way. At law the deeds would not be taken from the holder: *Pickering* v. *Noyes*, 1 B. & C. 262; unless he were a trustee for the person requiring him to deliver them up: *Street* v. *Brown*, 6 Taun. 302; *Ratcliffe* v. *Bleasby*, 3 Bing. 148; *Cocks* v. *Nash*, 9 Bing. 723; nor were they taken away in equity from a *bonâ fide* purchaser for value: *Wallyn* v. *Lee*, 9 Ves. 24; *Joyce* v. *De Moleyns*, 2 J. & L. 374: unless the claimant established a prior equitable interest: *Newton* v. *Newton*, L. R., 6 Eq. 135; 4 Ch. A. 143; nor even when in Court are they retained but for good reason: *Webb* v. *Lymington*, 1 Eden, 8; *Duncombe* v. *Mayer*, 8 Ves. 320; *Church* v. *Small*, 8 Ves. 322; such as the pendency of a suit relating to the property: *Stanford* v. *Roberts*, L. R., 6 Ch. A. 307. This right of the tenant in fee gave rise to the custom of inserting an express grant of the deeds in a conveyance. This custom has now, however, grown obsolete, the right to the deeds being now regarded as incident to the estate: *Harrington* v. *Price*, 3 B. & Ad. 170; *Austin* v. *Croome*, Car. & M. 653. But in the case of a transaction where the deeds will not go with the estate which is being created, as, for example, upon a mortgage for a term, it is matter for consideration whether the old custom should not be followed, though probably it would be found more convenient to employ special covenants, such as a covenant that the mortgagor

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shall allow the mortgagee to retain the deeds, as well after as before foreclosure, for the purpose of securing to the grantee the necessary power over the title deeds: *Wiseman* v. *Westland*, 1 Y. & J. 117; *Harper* v. *Faulder*, 4 Mar. 129; *Opie* v. *Godolphin*, Prec. Ch. 548; *Jenner* v. *Morris*, L. R., 1 Ch. A. 603.

Effect of the Statute of Uses.

It was for some time questioned whether the operation of the Statute of Uses was not to alter this rule. The statute had no operation directly upon the deeds, and it has been argued that the person on whom devolved the duty of defending the title, and, therefore, the right to the custody of the deeds, was the grantee or releasee to uses: Co. Litt. 6 a, note 4; 1 Saund. Uses, 119. And see Sugd. 440, for the older authorities. It seems now, however, to be settled law that this is not so, the seisin in the grantee or releasee to uses being merely momentary: *Harrington* v. *Price*, 3 B. & Ad. 170; *Philips* v. *Robinson*, 4 Bing. 106; *Lord* v. *Wardle*, 3 Bing. N. C. 680; *Lightfoot* v. *Keane*, 1 M. & W. 745; *Goode* v. *Burton*, 1 Ex. 189; *Garner* v. *Hannynton*, 22 Beav. 627; and in an Irish case, *Malone* v. *Minoughan*, 14 Ir. C. L. R. 540, the point has been expressly decided in opposition to the earlier cases and opinions. See also *Reece* v. *Trye*, 1 De G. & S. 273. The duty, therefore, of defending the title devolving upon the holder of the immediate estate of freehold, the right to the custody of the deeds falls to him also. The deeds will, therefore, belong to the tenant in fee as a matter of course. But when the estate is put into settlement, the question becomes a little more complicated. If the legal estate be vested in the trustee, he is entitled to hold the deeds: *Harper* v. *Faulder*, 4 Mad. 129; *Pincent* v. *Pincent*, 3 Atk. 571; *Denton* v. *Denton*, 7 Beav. 388; *Reece* v. *Trye*, 1 De G. & S. 273; the *cestui que trust* having only a right to production and copies; *Ex parte Houldsworth*, 4 Bing. N. C. 386; but if he be a mere grantee to uses, and the legal estate be *executed* in the *cestui que use*, the deeds will belong to the latter. In such settlements, the deeds will belong to the first tenant of the freehold—usually a tenant for life: *Webb* v. *Lord Lymington*, 1 Eden, 8; *Duncombe* v. *Mayer*, 8 Ves.

Right of tenant in fee.

Rights of trustee and *cestui que trust*.

Right of legal tenant for life.

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320; *Knott* v. *Wise*, cit. 8 Ves. 323; *Attwood* v. *Heywood*, 1 N. R. 289; *Garner* v. *Hannynton*, 22 Beav. 627. This right of the tenant for life is subject to the right of the owner of the immediate estate in remainder, if vested, to have the deeds brought into Court for safe custody: *Dixies* v. *Hilary*, Cary, 26; *Warren* v. *Rudall*, 1 J. & H. 1; *Garner* v. *Hannynton*, 22 Beav. 627; *Pennell* v. *Dysart*, 27 Beav. 542; *Ivie* v. *Ivie*, 1 Atk. 431; *Noel* v. *Ward*, 1 Mad. 322. When the relationship between the tenant for life and remainderman is that of father and son, the Court will rarely allow the remainderman to insist on the deposit of the deeds by the tenant for life: *Lempster* v. *Pomfret*, Amb. 154; *Pennell* v. *Dysart*, 27 Beav. 542; *Crop* v. *Norton*, 2 Atk. 74; *Pincent* v. *Pincent*, 3 Atk. 571, unless there be reason shown to apprehend that the deeds may be destroyed: *Jenner* v. *Morris*, L. R., 1 Ch. A. 603; *Leathes* v. *Leathes*, 5 Ch. D. 221. A remainderman in fee upon a life estate is, it appears, entitled to require the tenant for life to give up the deeds on having his life estate confirmed: *Joy* v. *Joy*, 2 Eq. Ca. Abr. 284; and the same rule applies to a jointress: *Senhouse* v. *Earl*, 2 Ves. 450; *Leech* v. *Trollop*, 2 Ves. 662; *Chamberlain* v. *Knapp*, 1 Atk. 52; *Petre* v. *Petre*, 3 Atk. 511; and to a doweress: *Tourle* v. *Rand*, 2 Bro. C. C. 652; but not to a tenant by the curtesy: *Ford* v. *Peering*, 1 Ves. jun. 76; *Dr. Leyfield's Case*, 10 Rep. 94 b; and see Co. Litt. 226. When there is a term of years preceding the estate of freehold, the termor is entitled to require the holder of the deeds to produce them for the proof of his title to the term: *Brigstocke* v. *Mansell*, 3 Mad. 47; *Davies* v. *Dysart*, 20 Beav. 445; but neither a termor nor an owner of a rent-charge or annuity is entitled to the custody of the deeds: *Whitfield* v. *Fausset*, 1 Ves. 394; *Harper* v. *Faulder*, 4 Mad. 129.

Right of remainderman.

Right of termor.

The deeds should always be secured by a mortgagee in fee, lest he be damnified by fraud of the mortgagor by the creation of a prior mortgage without notice: *Austin* v. *Croome*, 1 Car. & M. 653; *Harrington* v. *Price*, 3 B. & Ad. 170; *Worthington* v. *Morgan*, 16 Sim. 547; 1 Y. & J. 121; *Colyer* v. *Fynch*, 3 Jur.,

Where estate is in mortgage.

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N. S. 25; and the mortgagee of a life estate should also obtain possession of them, though his rights to the custody is subject to the same liability to have them brought into Court at the suit of the remainder as affects the right of his mortgagor. Similarly, the mortgagee of a remainder, if vested, can compel the deposit of the deeds: *Davies* v. *Dysart*, 20 Beav. 405; 21 Beav. 124; *Pennell* v. *Davies*, 27 Beav. 542; but the mortgagee of a remainder which is not vested has no such right: *Noel* v. *Ward*, 1 Mad. 322.

Right of mortgagee for term.

When a mortgage for a term is created, the mortgagee is not entitled to the custody of the deeds, except by virtue of a special grant or covenant: *vide supra*, p. 717.

Right of mortgagee.

The mortgagee may refuse to produce the deeds until he is paid off: *Sparke* v. *Montriou*, 1 Y. & C., Ex. 103; *Addison* v. *Walker*, 4 Y. & C. 447; *Damer* v. *Lord Portarlington*, 15 Sim. 380, even though his security be disputed: *Opie* v. *Godolphin*, 2 Eq. Ca. Abr. 284; Prec. Ch. 548; *Patch* v. *Ward*, L. R., 1 Eq. 436; *Chichester* v. *Lord Donegal*, L. R., 5 Ch. A. 497; *Crisp* v. *Platel*, 8 Beav. 62; *Dendy* v. *Cross*, 11 Beav. 91; unless, indeed, his mortgagor could have been compelled to produce them, in which case he is bound to do so either with the consent of the mortgagor, or on the order of the Court: *Lambert* v. *Rogers*, 2 Mer. 490. And when a mortgagee has consented to a sale by the Court, or, perhaps, even allowed the mortgagor to sell under an impression that he would consent to the sale, he is bound to produce the deeds to enable the sale to be carried out: *Livesey* v. *Harding*, 1 Beav. 343; *Crosse* v. *Revy. Society*, 3 De G., M. & G. 712. If the deeds be stolen, destroyed, or lost, by the negligence or fault of the mortgagee, he is bound to replace such as can be replaced, and to give an indemnity, and make compensation for the damage done to the estate by his fault: *Smith* v. *Bicknell*, cit. 3 Ves. & B. 51; *Stokoe* v. *Robson*, 19 Ves. 385; *Shelmardine* v. *Harrop*, 6 Mad. 39; *Lord Midleton* v. *Eliot*, 15 Sim. 531; *Hornby* v. *Matcham*, 16 Sim. 325; *Brown* v. *Sewell*, 11 Ha. 49; *Schoole* v. *Sall*, 1 Sch. & Lef. 176. But a mortgagee who takes reasonable care of the deeds, will

Liability of mortgagee where deeds lost.

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not, if they be lost by accident, be severely dealt with: *Woodman* v. *Higgins*, 14 Jur. 846.

Where there are several co-owners.

Co-owners of an estate are entitled to production of the deeds relating to their title: *Lambert* v. *Rogers*, 2 Mer. 489; *Burton* v. *Neville*, 2 Cox, 242; *Fain* v. *Ayers*, 2 S. & St. 533; *Lord Banbury* v. *Briscoe*, 2 Ch. Ca. 42; Sugd. 442; but one co-owner cannot compel another co-owner who has possession of the deeds to part with them. The one who can obtain the deeds is entitled as against his co-owners to retain them: *Foster* v. *Crabb*, 12 C. B. 136; the deeds must remain in the custody in which chance has placed them: *Yea* v. *Field*, 2 T. R. 708.

When vendor entitled to retain deeds.

When the vendor sells the whole of his estate, with the exception of any portion, however small, he was considered to be entitled to retain the deeds upon his giving a covenant for their production: see Dart, V. & P. 674; and this view of his right has now received the sanction of the legislature; for the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 3, enacts that, "when the vendor retains any part of an estate to which any documents of title relate, he shall be entitled to retain such documents." But after the conveyance has been executed, he has no right over or lien upon the title deeds, no matter how ancient, which relate exclusively to the property sold. His right, in the event of the purchase-money being partly unpaid, is to a lien upon the estate: *Winter* v. *Lord Anson*, 3 Russ. 488; *Mackreth* v. *Symmons*, 15 Ves. 336; and if he deliver the deeds to a third party, *Harrington* v. *Price*, 3 B. & Ad. 170; *Hooper* v. *Ramsbottom*, 6 Taunt. 12, or retain them himself, after conveyance executed, the purchaser may recover them at law, notwithstanding the purchase-money has not been paid; unless, indeed, the deed was delivered merely as an escrow, to take effect upon the payment of the money: *Goode* v. *Burton*, 1 Exch. 189; or if other property retained by the vendor be held under the same deed: *Yea* v. *Field*, 2 T. R. 708. Nor has the solicitor of the vendor, or of any other person, any right to any lien upon the deeds for costs: *Bell* v. *Taylor*, 8 Sim. 21;

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Phillips v. *Robinson*, 4 Bing. 106; *Smith* v. *Chichester*, 2 Dr. & War. 393; *Blunden* v. *Desart*, 2 Dr. & War. 465; *Christian* v. *Field*, 2 Ha. 177. And a vendor who has entered into a covenant to produce deeds to a purchaser, would not, in the opinion of Lord *St. Leonards*, Sugd. 434 *et seq.*, be entitled, on the occasion of a second sale, to refuse to deliver the deeds to the second purchaser, if that second purchaser will permit the deeds to be endorsed with a notice of the covenant for production. Apparently the second purchaser would now be bound to give to the first purchaser an acknowledgment of his right to production of the deeds, and an undertaking for their safe custody; or to indemnify the vendor against his liability to produce them: Dart, V. & P. 561, 675. And as to the acknowledgment of the right to production generally, see tit. ACKNOWLEDGMENTS, Vol. I., pp. 251 *et seq.*

Cases in which condition as to custody necessary.

The purchaser being, subject to the exceptions above mentioned, entitled to the possession of the title deeds of the property purchased by him, it remains to mention the cases in which it is necessary to provide by condition for the custody of deeds.

Condition as to acknowledgment of right to produce.

The right of a vendor who retains any portion of an estate being statutory, there is now no necessity to provide by condition for the custody of the deeds in ordinary cases of that sort, further than to employ a condition that the vendor shall give an acknowledgment of right to production, and in the case of a sale by trustees (*l*) or mortgagees expressly negativing or limiting the right of the purchaser to an undertaking for safe custody of the deeds. But where part only of a mortgaged estate is sold, and the purchase-money is not likely to be sufficient to pay off the incumbrance, it ap-

(*l*) As to whether under an open contract trustees can be required to give an undertaking for the safe custody of deeds retained by them, see tit. ACKNOWLEDGMENTS, Vol. I., pp. 256 *et seq.* The point was recently raised in *Re Agg-Gardner*, 25 Ch. D. 600, but was not necessary to the decision of the case, the property in question being enfranchised copyholds (see *post*, p. 895); and accordingly it will be prudent, on a sale by trustees, to insert in the conditions or contract of sale an express stipulation on the subject.

pears wise to provide by condition that the title deeds shall be deposited in safe custody for the benefit of the purchaser and of the mortgagee: Sugd. V. & P. 435. This will, however, only be possible when the mortgagee is willing to assent to such a plan. And it must be remembered that where, upon a sale by mortgagor and mortgagee, both of them are required to bind themselves to produce or procure the production of deeds, the mortgagee alone can give an acknowledgment, but the mortgagor must covenant in the old form. Upon the same principle, in *Shore* v. *Collett*, G. Coop. 234, where part of an estate on lease was sold, the Court thought that the counterpart of the lease ought to be deposited for the benefit of all parties. Preparation of Conditions.

Where an estate is sold in lots it is usually necessary to make careful provision for the ultimate destination of the title deeds. Where no agreement has been made, the rule has been to deliver the deeds to the purchaser of the largest lot in value, on his giving to the other purchasers a proper acknowledgment of their right to production and undertaking for safe custody: *Griffiths* v. *Hatchard*, 1 K. & J. 17. In *Scott* v. *Jackman*, 21 Beav. 110, it was held that under a condition that the purchaser of the "largest lot" should have the deeds, the purchaser of the largest single lot was entitled rather than a purchaser of several smaller lots. See also *Abbott* v. *Darnell*, 2 Jur., N. S. 631; *Kinnaird* v. *Christie*, cit. Dan. Ch. Prac. This practice is not touched either by the Vendor and Purchaser Act, 1874, or by the Conveyancing and Law of Property Act, 1881. It is conceived that the most suitable form to adopt is that which provides for the delivery of the deeds to the purchaser of the largest lot in value, that being the standard which most readily admits of comparison. The same precaution should also be taken upon the sale in lots of an estate in lease. See and consider *Shore* v. *Collett*, G. Coop. 234. Custody of deeds on sale of estate in lots.

The purchaser was formerly entitled, in default of the deeds themselves, and if there were no stipulation to the contrary in the contract, to attested copies of Attested copies.

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the title deeds at the expense of the vendor: *Dare* v. *Tucker*, 6 Ves. 460; *Boughton* v. *Jewell*, 15 Ves. 176; *Berry* v. *Young*, 2 Esp. 640, n.; *Cooper* v. *Emery*, 1 Phil. 388; *Yates* v. *Plumb*, 2 Sm. & G. 174; *Campbell* v. *Campbell*, Sugd. 447, 449. The right of the purchaser to fix the vendor with this expense was left untouched by the Vendor and Purchaser Act, 1874; but it has since been dealt with by the Conveyancing and Law of Property Act, 1881, sect. 3 (6), *ante*, p. 635. The words in the first part of this sub-section as to documents not in the vendor's possession seem to be amply wide enough to cover the costs of the making of attested copies for the purpose of delivery to the purchaser; while the last sentence of the sub-section appears, so far as regards deeds and documents retained by the vendor, to have been framed with a view to this particular point. It is to be noticed, also, that the sub-section is so worded as to include certain kinds of documents as to which it was formerly uncertain whether the purchaser could require attested copies. Thus the purchaser's right appears not to have extended to copies of court roll or deeds enrolled under the various statutes which require enrolment: *Cooper* v. *Emery*, 1 Phill. 388; *Campbell* v. *Campbell*, Sugd. 449; nor, according to Lord *St. Leonards*, to deeds enrolled in a Court of Record, or wills registered or accessible: Sugd. V. & P. 448; but the practice in this respect was apparently not uniform. The right to attested copies belonged to a purchaser from the assignees of a bankrupt, who, if they could not hand in the deeds, were bound to furnish attested copies and a proper covenant: *Ex parte Stuart*, 2 Rose, 215; and trustees for sale were under a similar liability: *Onslow* v. *Lord Londesborough*, 10 Ha. 74. As to the effect of the old condition (now substantially adopted by the statute) where, on a sale in lots, the title deeds are handed over to the largest purchaser, see *Peterson* v. *Elwes*, 6 W. R. 611.

Value of attested copies.

Lord *Eldon*, in *Dare* v. *Tucker*, 6 Ves. 460, remarked that purchasers attached too much importance to the possession of attested copies, which were in fact mere waste paper upon eject-

ment; but their practical value is, that whereas a sale is not materially damped by a condition that attested copies are to be accepted in lieu of originals, a condition that neither originals nor copies should be required would have a seriously detrimental effect: Dart, V. & P. 676. **Preparation of Conditions.**

The purchaser's right extended also, in the absence of a condition, to a covenant for production of all deeds, to attested copies of which he was entitled: *Barclay* v. *Raine*, 1 S. & St. 449; *Boughton* v. *Jewell*, 15 Ves. 176; *Gabriel* v. *Smith*, 16 Q. B. 847. Such covenant had to be furnished at the expense of the vendor; even though the vendor were the assignee of a bankrupt: *Ex parte Stuart*, 2 Rose, 215; and included the production of such copies of court roll and instruments on record as were in the vendor's possession: *Berry* v. *Young*, 2 Esp. 640, n.; *Cooper* v. *Emery*, 1 Phill. 388. Purchaser's right to production, &c.

It was formerly necessary to make careful provision in the conditions for throwing these expenses on to the purchaser. There was a distinction in this respect between ordinary sales and sales by the Court; for in the case of *Strong* v. *Strong*, 4 Jur., N. S. 943, it was held that upon a sale by the Court in lots, the purchasers having notice that the deeds would be delivered to the largest purchasers, who would covenant for their production, each purchaser was bound to pay for his deed of covenant. But by the Vendor and Purchaser Act, 1874, sect. 2, r. 4, it is enacted that—

> "Such covenants for production as the purchaser can and shall require shall be furnished at his expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser."

It is, however, doubtful whether this provision extends to incorporeal hereditaments. The right arises only in respect of contracts of sale of land made after 31st December, 1874, and that Act contains no definition of the word "land." And the definition contained in the Act 13 & 14 Vict. c. 21, s. 4, makes it include messuages, tenements and hereditaments, houses and buildings of every

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tenure, unless its meaning is restricted. If this definition be compared with that in the Conveyancing and Law of Property Act, 1881, s. 2, sub-s. (ii), which runs—

> "Land, unless a contrary intention appear, includes land of any tenure, and tenements and hereditaments, corporeal and incorporeal, and houses and other buildings; also an undivided share in land,"

it will appear probable that the old rule as to costs of covenants for production applies in the case of incorporeal hereditaments, and that upon the sale of any such property conditions in the old form must be employed to throw the cost of their preparation upon the purchaser.

Re-sale and forfeiture of deposit.

Conditions as to Re-sale and Forfeiture of Deposit.]—It is customary, and certainly prudent, to insert a condition providing that, if the purchaser does not comply with the conditions of the contract, he shall forfeit the deposit, and that the vendor shall be at liberty to re-sell the estate, either by auction or private treaty, and under the same or any other conditions, and that if the price obtained upon a second sale shall not be as large as that which the purchaser undertook to give, the deficiency, and all expenses occasioned by such re-sale, shall be immediately paid to the vendor by the purchaser, and shall be recoverable as liquidated damages. Such a provision as this will enable a vendor to re-sell the estate without having recourse to the Court to set aside the contract, or to have a sale in virtue of his lien for unpaid purchase-money, and recover any deficiency from the purchaser, proceedings which would involve considerable time and trouble: *Ex parte Seaforth*, 19 Ves. 235; *Hope* v. *Booth*, 1 B. & Ad. 498; *Gray* v. *Gray*, 1 Beav. 199; *Harding* v. *Harding*, 4 My. & Cr. 514. The vendor, on the re-sale, is not the agent of the purchaser, but sells, as having annulled the previous sale: *Lamond* v. *Davau*, 9 Q. B. 1030; *Moss* v. *Matthews*, 3 Ves. 279; *Ex parte Hunter*, 6 Ves. 94. And see *Seton* v. *Slade*, 7 Ves. 275. Nor, if the price produced by the re-sale should be larger than that obtained upon the first sale, can the

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purchaser require the vendor to account for the difference: per *Eldon*, L. C., in *Ex parte Hunter*, 6 Ves. 94. The clause, however, is not very often put into force; and it seems that a trustee selling under conditions amongst which it is included, would not necessarily be liable for a breach of trust for neglecting to take advantage of it: *Thomson* v. *Christie*, 1 Macq. H. L. C. 236. The costs of the re-sale might not, perhaps, in the absence of a condition, be readily recoverable by the vendor. They would, as above remarked, be recoverable only by means of a sale by the Court. But the vendor was allowed to recover them even in bankruptcy under the condition, although, as they were in the nature of unliquidated damages, this result was attained only in a circuitous manner: *Ex parte Hunter*, 6 Ves. 94. Under the usual condition, and having regard to the Bankruptcy Act, 1883, sect. 37, sub-sect. 3, *ante*, p. 430, it is conceived that the difficulty would not arise, but that the vendor would be able to prove, for costs and deficiency alike, in the purchaser's bankruptcy. This condition is no bar to the right of a vendor to sue for damages for breach of contract in the usual manner: *Icely* v. *Grew*, 6 Nev. & M. 467; though he cannot, upon a re-sale at a loss, sue for the original purchase-money: *Lamond* v. *Davau*, 9 Q. B. 1030.

When the deposit is forfeited.

The clause relating to the forfeiture of deposit is, if not necessary, at all events prudent. See *Hinton* v. *Sparkes*, L. R., 3 C. P. 161. The Courts have held that it was a question of intention whether, in the absence of an express stipulation, the deposit was or was not forfeited. Thus in *Palmer* v. *Temple*, 1 Per. & D. 379; *S. C.*, 9 A. & E. 502, where a deposit was paid, and the contract contained a stipulation that if either party failed to perform the agreement, he should pay to the other 1,000*l.* by way of liquidated damages, it was held that the vendor was entitled to no other remedy, and that as the vendor had re-sold the estate, he had lost his right to retain the deposit. See also *Ockenden* v. *Healey*, 1 E., B. & E. 485; *Casson* v. *Roberts*, 8 Jur., N. S. 1199; *Catton* v. *Bennett*, 51 L. T. 70. It must be borne in mind that the deposit is in

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fact part of the purchase-money; and that although at law the condition was enforceable, *Nicoll* v. *Chambers*, 11 C. B. 996, yet if the purchaser were able and willing, in spite of the breach of condition, to put the vendor in the same position as if the contract had been carried out, equity would relieve against the forfeiture of the deposit: *Vernon* v. *Stephens*, 2 P. Wms. 66; *Moss* v. *Matthews*, 3 Ves. 279. So, also, when the vendor sues the purchaser for a deficiency upon the re-sale, the deposit will be set off against the damages: *Ockenden* v. *Healey*, 1 E., B. & E. 485.

Recovery of deposit by purchaser.

If the purchaser has disentitled himself to sue for damages for non-completion of the contract, he cannot recover the deposit: *Howe* v. *Smith*, 50 L. T. 573; nor if by his own default he has lost the right to enforce the first contract, and has thereby forfeited his deposit, will a re-sale by the vendor give to him a right which he would not otherwise have had: Sugd. V. & P. 40. But when the contract is not binding, the purchaser is entitled to have his deposit returned; *Casson* v. *Roberts*, 31 Beav. 613; though where the invalidity of the contract is due to its not complying with the Statute of Frauds, the purchaser may, by his conduct, incapacitate himself from recovering his deposit: *Thomas* v. *Brown*, 1 Q. B. D. 714, and if he object that the contract is not good, and it turn out afterwards to be valid, he has no claim: *Lethbridge* v. *Kirkman*, 25 L. J., N. S. 89. Nor is a purchaser entitled to put an end to the contract by merely forfeiting his deposit, but may be held to his purchase: *Crutchley* v. *Jerningham*, 2 Mer. 502; *Rosenberg* v. *Cook*, 8 Q. B. D. 162. Nor can the trustee in bankruptcy of a purchaser disclaim a contract, and also recover the deposit, even though there be no clause in the contract providing for the forfeiture of the deposit: *Dupree* v. *Bedborough*, 4 Giff. 479; *Ex parte Barrett*, L. R., 10 Ch. A. 512. And see *Collins* v. *Stimson*, 11 Q. B. D. 142.

Waiver of right of re-sale.

The vendor may, however, waive his right to re-sell under the condition—as, for instance, in *Ex parte Gardner*, 4 Y. & C., Ex. 503, where the vendors allowed the purchaser to retain possession of the

premises, and subsequently took from him a power of attorney to enter up judgment for the purchase-money due, it was held that the clause of forfeiture had been waived (*m*).

Duties of trustees for sale.

Of Sales by Trustees and Depreciatory Conditions.]— It is the duty of trustees, when selling the property of their *cestuis que trustent*, to make every endeavour and take every care to sell to the very best advantage: *Downes* v. *Grazebrook*, 3 Mer. 208. And if the trustees enter into a contract for sale under conditions which may reasonably be supposed to have damped the sale, by leading purchasers to assume that they would not get as good a title as the trustees really can give, or that in any other respect they were not to have all that they are fairly entitled to expect, the sale will be in effect a breach of trust, and will not be enforced by the Court; and, on the other hand, under certain circumstances, the purchaser will be fixed with notice of the breach of trust, and will be liable to have his purchase upset; while, in any event, the trustees will be liable both to their *cestuis que trustent* and to the purchaser in respect of their dereliction of duty. Thus in *White* v. *Cuddon*, 8 Cl. & F. 788, it is said:—"In the present case, the contract we are called upon to enforce is one which the vendors, as trustees, had no right whatever to make, and which, if performed, would cast upon the *cestuis que trustent* the consequences of their own negligence. This a Court of Equity never can do." See also *Mortlock* v. *Buller*, 10 Ves. 292; *Shrewsbury, &c. Rail. Co.* v. *L. & N. W. Rail. Co.*, 4 De G., M. & G. 115; 6 H. L. Cas. 112; *Maw* v. *Topham*, 6 Beav. 576; *Bridger* v. *Rice*, 1 Jac. & W. 74; *Turner* v. *Harvey*, Jac. 178; *Wood* v. *Richardson*, 4 Beav. 174; *Baylis* v. *Baylis*, 1 Coll. 546; *Bellinger* v. *Blagrave*, 1 De G. & S. 66; *Rede* v. *Oakes*, 4 De G. & S. 305; *Sneesby* v. *Thorne*, 7 De G., M. & G. 399. On the other hand, in *Dance* v. *Goldingham*, L. R., 8 Ch. A. 902, a sale by trustees was stopped

(*m*) As to the right of a purchaser to recover his deposit in the event of the contract going off through the fault of the vendor, *vide ante*, p. 645.

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by injunction, at the suit of a *cestui que trust* on the ground that the conditions of the sale were depreciatory. For a case in which the purchaser was prejudically affected in consequence of a breach of trust on the part of his vendors, see *Stevens* v. *Austin*, 7 Jur., N. S. 873; and with respect to costs, see *Sanderson* v. *Walker*, 13 Ves. 601; *Baker* v. *Carter*, 1 Y. & C., Ex. 260; *Downes* v. *Grazebrook*, 3 Mer. 209. A purchaser can also, in many cases, resist specific performance of a contract for sale under depreciatory conditions, as in *Dunn* v. *Flood*, 33 W. R. 315.

Trustees must deal fairly with all their beneficiaries.

Trustees are also bound, when they are selling property in which several sets of persons are beneficially interested, to see that the various interests are fairly and evenly dealt with, and that the sale is not so conducted as to favour one beneficiary at the expense of another. For instance, it may be to the interest of one *cestui que trust* to have the property sold in any event, and at any sacrifice, in order to pay off incumbrances, while the interest of another may be to secure that the largest possible amount shall be obtained: *Rede* v. *Oakes*, 4 De G. & S. 305; *Ord* v. *Noel*, 5 Mad. 440.

Voidable sales by trustees may be confirmed by beneficiaries.

A voidable sale by trustees may, however, be confirmed by the acquiescence of their *cestuis que trustent;* and of this the lapse of time is very strong evidence: *Lord Selsey* v. *Rhoades*, 1 Bli., N. S. 1; *Rudd* v. *Sewell*, 4 Jur. 882; *Beadon* v. *King*, 9 Ha. 532; *Chalmer* v. *Bradley*, 1 Jac. & W. 51; *Baker* v. *Read*, 18 Beav. 398; *Life Association of Scotland*, 7 Jur., N. S. 785; *Morse* v. *Royal*, 12 Ves. 374; *Gregory* v. *Gregory*, G. Coop. 201; Jac. 631; *Seagram* v. *Knight*, L. R., 3 Eq. 398; 2 Ch. A. 628. It appears, however, that classes, in this respect, have larger licence allowed them than is given to individuals: compare *Hall* v. *Noyes*, cit. 3 Ves. 748, with the anonymous case cited 6 Ves. 632; and see *Whichcote* v. *Lawrence*, 3 Ves. 740; and *York Buildings Co.* v. *Mackenzie*, 8 Bro. P. C. 42; where it appears that a creditor may impeach a sale by trustees under a bankruptcy, under circumstances as to lapse of time which would operate as a bar to ordinary *cestuis que trustent.*

Whether trustees

Though trustees for sale are not in all instances

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absolutely bound to sell by auction, it is still wise, before making a sale by private treaty, to offer the property to public competition in an auction room, so as to preclude the beneficiaries from raising any question as to the adequacy of the price: *Davey* v. *Durrant*, 1 De G. & J. 535; *Harper* v. *Hayes*, 2 De G., F. & J. 542; but of course the terms of the trust must be complied with, and if directed to sell by public auction they cannot sell by private contract, no matter what sum be offered: *Daniel* v. *Adams*, Amb. 465; *In re Lofft*, 8 Jur. 206. Nor, if the sale is to be by private treaty, can they sell by auction. Where, however, after an abortive attempt to sell by public auction in accordance with the trust, a private treaty has been entered into, the transaction has been upheld: *Else* v. *Barnard*, 28 Beav. 228; *Bousfield* v. *Hodges*, 33 Beav. 90.

should sell by private contract.

Sale of undivided shares.

It seems probable that trustees of undivided shares of property are hardly justified in selling those shares alone: Dart, V. & P. 68; but should join with the owners of the other shares in effecting a sale: *McCarogher* v. *Whieldon*, 34 Beav. 107. A purchaser on such a sale, would, however, be entitled to refuse to complete, unless the various interests concerned were fairly and properly dealt with: *Rede* v. *Oakes*, 10 Jur., N. S. 1246.

Delivery of possession.

Trustees should not give possession of the estate until the whole of the purchase-money has been paid: *Oliver* v. *Court*, 8 Price, 186; *Thompson* v. *Christie*, 1 Macq. H. L., at p. 241.

Sale of timber.

Trustees for sale may not sell timber apart from the inheritance, unless specially authorized so to do: *Cholmeley* v. *Paxton*, 3 Bing. 307; *Cockerell* v. *Cholmeley*, 1 Russ. & M. 418; *Davies* v. *Wescomb*, 2 Sim. 425; *Marker* v. *Kekewich*, 9 Ha. 299; *Bennett* v. *Wyndham*, 23 Beav. 521. Such a sale is not now absolutely void, but may be established under the provisions of 22 & 23 Vict. c. 35, s. 13. Similarly, minerals may not be sold apart from the surface, unless with the consent of the Court under the Act 25 & 26 Vict. c. 108, a statute which was passed in consequence of the decision in *Buckley* v. *Howell*, 29 Beav. 546. As to sales of timber by limited owners of settled lands, see sect.

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35 of the Settled Land Act, 1882 (45 & 46 Vict. c. 38).

Trustees for sale should not, if they can help it, sell more than is necessary to enable them to carry out the purposes of their trust; but there is no obligation upon a purchaser to see that in this respect they have not exceeded their duty: *Spalding* v. *Shalmer*, 1 Vern. 301; *Dolton* v. *Hewen*, 6 Mad. 9; *Thomas* v. *Townsend*, 16 Jur. 736.

Mode of conduct of sale by trustees.

Trustees for sale are entitled to adopt the usual methods of preparing for and conducting a sale. They should take care to have the title examined, to the end that all proper conditions of sale and no improper ones may be employed, and may avail themselves of the service of counsel for the purpose: *Ex parte Lewis*, 3 De G., M. & G. 173. They may also, if acting prudently and reasonably, employ the customary agents: *Ex parte Belchier*, Amb. 218; and if they have acted with propriety in trusting an auctioneer, and any loss results from his conduct, they will not be personally liable therefor: *Edmonds* v. *Peake*, 7 Beav. 239. So, also, proper valuations should be made, for any undue statement of value will render the sale incapable of being enforced: *White* v. *Cuddon*, 8 Cl. & F. 766; *Campbell* v. *Walker*, 5 Ves. 68; or if it be a gross mis-statement may even bind the property in the hands of the purchaser: *Stevens* v. *Austin*, 7 Jur., N. S. 873.

Advertisement of the sale.

They are bound also to take the usual steps for advertising the sale and securing a proper amount of competition; if this be not done it may invalidate the whole transaction: *Ord* v. *Noel*, 5 Mad. 440; *Harper* v. *Hayes*, 2 Giff. 217; or the sale may be prohibited by injunction: *Blennerhasset* v. *Day*, 2 Ball & B. 133. The same rule applies in the case of a mortgagee selling under his powers: *Jones* v. *Matthie*, 11 Jur. 504; *Jenkins* v. *Jones*, 2 Giff. 99.

Discretion of trustees as to conditions.

In the choice of the conditions to be used trustees are allowed a fair discretion, and conditions, even though of an unusual character, will not lightly be deemed to be of such a depreciatory character as to amount to a breach of trust or constitute an objection to title: Sugd. V. & P. 63; and see *Hobson* v.

Bell, 2 Beav. 17; *Hyde* v. *Dallaway*, 4 Beav. 606; *Morley* v. *Cook*, 2 Ha. 106. It is very usual in framing trusts for sale to give to trustees special powers to sell under special conditions as to title and other matters. What precise increase of the ordinary powers of trustees this clause confers is not easy to determine; probably, in the case of a doubtful condition, it would turn the scale in favour of the trustee. The addition of the further provision that the use of unnecessary or improper conditions shall not affect the purchaser, though it might perhaps enable the vendors to compel the completion of the sale, would not protect the trustees against claims by their *cestuis que trustent:* Dart, V. & P. 174. **Preparation of Conditions.**

Trustees for sale were not at liberty, in the absence of special authority, to buy in the property: *Ex parte Lewis*, 1 Gl. & J. 69; *Taylor* v. *Tabrum*, 6 Sim. 281; but now under 23 & 24 Vict. c. 145, ss. 1, 2, unless expressly forbidden so to do, they may pursue this course. The same Act empowers trustees to sell in lots, a procedure which they were formerly entitled to adopt when, under proper advice, it was deemed prudent: *Ord* v. *Noel*, 5 Mad. 438. Buying in the property.

Trustees should not, however, unless special authority be given them in the deed creating their trust, fix a reserved bidding; for though it will bind the bidders at the sale, *Levy* v. *Prendergrass*, 2 Beav. 415, it may expose them to hostile action at the hands of their *cestuis que trustent: Taylor* v. *Tabrum*, 6 Sim. 281; *Fry* v. *Fry*, 27 Beav. 144; and see *Re Peyton's Settlement*, 8 Jur., N. S. 453; 30 Beav. 252; *Else* v. *Barnard*, 28 Beav. 228; *Bousfield* v. *Hodges*, 33 Beav. 90. Reserved biddings.

In *Hobson* v. *Bell*, 2 Beav. 17, Lord *Langdale* held that trustees were justified in using conditions providing that requisitions on title should be delivered within twenty-one days, and that all objections not then taken should be waived; that the purchaser should require no other person than the vendor to join in the conveyance; that the purchaser should pay for all copies of deeds and documents not in the possession of the vendor; that any mis-statement Conditions as to delivery of requisitions, concurrence of parties, copies of deeds, compensation, and resale.

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or error in the particulars should not annul the sale, but be the subject of compensation; and that the vendor might re-sell upon failure of the purchaser to comply with the conditions, and recover any deficiency from the purchaser. It has, however, been held, and must be taken to be law, that though the trustees may insert the condition as to compensation, they are not allowed to give any compensation for their own mistake: *White* v. *Cuddon*, 8 Cl. & F. 766; and see *Hill* v. *Buckley*, 17 Ves. 394; and the usual plan is to provide, upon sales by trustees, that no compensation shall be allowed. A mortgagee, however, is entitled to use this condition upon exercising his power of sale.

Conditions as to rescinding the sale.

The usual condition for rescission, if a purchaser presses requisitions which the vendor is unable and unwilling to answer, is proper to be used by trustees: *Faulkner* v. *Equitable, &c. Co.*, 4 Drew. 352; *Hoy* v. *Smithies*, 22 Beav. 510; *Warde* v. *Dickson*, 28 L. J., N. S. 315.

Conditions as to title, &c.

The conditions relating to title should be very carefully framed so as to allow the purchaser to have full information without unnecessarily suggesting flaws in the title: *Borrell* v. *Dann*, 2 Ha. 443. For instance, in *Rede* v. *Oakes*, 10 Jur., N. S. 1246, it was considered doubtful whether the *cestuis que trustent* were bound by a sale, one of the conditions of which required the purchaser to accept a seventeen years' title, without at the same time stating that the part of the property as to which the restriction was necessary was small and comparatively unimportant. And see *Dance* v. *Goldingham*, L. R., 8 Ch. A. 902.

Conditions as to easements, tenancies, &c.

Trustees should not use conditions which, though in ordinary use, may suggest to a purchaser that the property is affected by rights of third parties to a greater extent than it really is: *Dunn* v. *Flood*, 33 W. R. 315.

Conditions as to payment of the purchase-money.

Trustees were justified, if occasion required it, in inserting a condition that the purchasers should accept their receipt: *Wilkinson* v. *Hartley*, 15 Beav. 187; for the inability to give a receipt for purchase-money constitutes a defect in title: *Forbes* v. *Peacock*,

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12 Sim. 528. But now by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 36, the receipt in writing of any trustees for any money payable to them under any trust or power is a sufficient discharge for the same, whether their trust was created before or after the commencement of the Act (*n*).

Statutory conditions.

By sect. 3 of the Vendor and Purchaser Act, 1874, and by sect. 66 of the Conveyancing and Law of Property Act, 1881, trustees may avail themselves of the conditions which, by those Acts, are to be read into all conditions of sale or contracts entered into, or sales made, since the 31st December, 1874, or the 31st December, 1881, as the case may be; and having regard to subs. (3) of such sect. 66, it is probable that the legal advisers of trustees would be bound not to exclude their clients from the benefit of the protection of the Act.

Trustee in bankruptcy.

Trustees in bankruptcy have, under the Act of 1883, sect. 56 (stated *ante*, p. 457), power to sell the real estate of the debtor. They are not bound to offer the estate for sale by auction in the first instance, but it would be prudent so to do before entering into a contract by private treaty, to save any question as between themselves and the creditors with respect to the adequacy of the price obtained: *Ex parte Dunman*, 2 Rose, 66; *Ex parte Byrom*, 3 M., D. & De G. 55: see also *Re Motion*, L. R., 9 Ch. A. 192; and they are, generally speaking, bound by the same considerations, and by the same rules, with regard to what conditions may and may not be used, as ordinary trustees for sale: *Wilkins* v. *Fry*, 1 Mer. at p. 268. See also *Freme* v. *Wright*, 4 Mod. 364; *White* v. *Foljambe*, 11 Ves. 343.

4. Of the Memorandum.

Memorandum of contract on a sale by auction.

Sales by auction, or rather the contracts for the sale and purchase of land which are the result of

(*n*) As to the right of a purchaser to require the attendance of trustees to receive the purchase-money, see *ante*, p. 647.

Of the Memorandum.

sales by auction, are generally(*o*) within the Statute of Frauds: *Buckmaster* v. *Harrop*, 13 Ves. 456; *Blagden* v. *Bradbear*, 12 Ves. 466; *Higginson* v. *Clowes*, 15 Ves. 521; and all the requirements of the statute must be observed: *vide ante*, Vol. I., pp. 272 *et seq.* Hence it is necessary, in the case of ordinary sales by auction, that there should be a sufficient memorandum of the contract, properly signed by the party or parties to be charged therewith. The memorandum must contain a description of or a reference to the subject-matter of the contract, the parties thereto, and the price to be paid.

What is sufficient description of property sold.

With respect to the subject-matter of the contract, the maxim *id certum est quod certum reddi potest* applies; for instance, in the case of *Shardlow* v. *Cotterell*, 20 Ch. D. 90, it was held that a receipt which referred merely to "the property sold at the Sun Inn," was a memorandum which met the requirements of the statute. But an agreement for the sale of land, with a reservation of the necessary land for the construction of a railway, was considered too vague to be enforced: *Pearce* v. *Watts*, L. R., 20 Eq. 492; *McMurray* v. *Spicer*, L. R., 5 Eq. 527. Where, however, the defendant had agreed that if he bought a particular estate he would sell a part of it to the plaintiff, there being clear proof of what that part was, the contract was decreed to be specifically performed: *Chattock* v. *Muller*, 8 Ch. D. 177; *Donnison* v. *People's Café Company*, 45 L. T. 187.

Of parties to the contract.

Similarly, the requirements of the statute as to the naming or describing the parties to the contract must be satisfied. It is not necessary, and so far as the vendor is concerned it is certainly not usual, that the actual names should appear on the face of the particulars or in the memorandum. It is enough

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(*o*) The Court, however, held that sales before the Master under the old practice were not within the statute, doubtless because there was no reason to fear the frauds and unfair dealings against which the statute was intended to provide: see *Att.-Gen.* v. *Day*, 1 Ves. 218; *Lord* v. *Lord*, 1 Sim. 503; and the same view would, in all probability, be taken under the present practice: Dart, V. & P. 1201; and Fry on Specific Performance, pp. 245, 246.

Of the Memorandum.

if they be sufficiently identified: *Sale* v. *Lambert*, L. R., 18 Eq. 3; for all the statute requires is that they should "be described in such a manner that there can be no fair or reasonable dispute as to the person who is selling or buying:" per *Jessel*, M. R., in *Potter* v. *Duffield*, L. R., 18 Eq. 4. The questions which arise are usually concerned with the description of the vendor, for the purchaser is as a rule sufficiently identified by the signature either of himself or of his agent. The following descriptions of the vendor have been held to be sufficient:—"executor" of a person named: *Hood* v. *Barrington*, L. R., 6 Eq. 218; "proprietor": *Sale* v. *Lambert*, L. R., 18 Eq. 1; *Rossiter* v. *Miller*, 3 App. Cas. 1124; and see *Beer* v. *London and Paris Hotel Co.*, L. R., 20 Eq. 412 (where, however, the decision seems to have gone rather upon the point of agency for an undisclosed principal); "company," where it appeared that one particular company was in actual occupation: *Cummins* v. *Scott*, L. R., 20 Eq. 11; "trustee selling under a trust for sale:" *Catling* v. *King*, 5 Ch. D. 661. These designations, and others suggested by Lord *Cairns* in *Rossiter* v. *Miller*, 3 App. Cas., at p. 1141, seem to be considered sufficient, because there can be only one person or set of persons answering to the description of owner, proprietor, or trustee for sale. It is conceived, however, that any ambiguity in this matter would render the contract liable to be avoided; and that if it should happen that there were two sets of trustees of the same property under different instruments, or if there be a first and subsequent mortgagees, it would be at least prudent to use such terms as would sufficiently point out which trustees or which mortgagee were selling. See *Catling* v. *King*, 3 Ch. D. at p. 664. And *à fortiori* it is essential that there should be no misdescription; for instance, where leaseholds are being sold by the *administrator de bonis non durante absentiâ* of the next of kin, it will not do to say that they are sold "by order of the executors." See *Webb* v. *Kirby*, 7 De G., M. & G. 376; see also further as to this, *ante*, Vol. I., p. 311.

Description of vendor.

The price also should be stated, or should be so

As to price.

Of the Memorandum.

referred to as to be capable of being ascertained with certainty: *vide ante*, Vol. I. p. 325.

Memorandum must state or refer to the terms of the contract.

The memorandum must also contain either the conditions upon which the sale is carried out, or a sufficient reference to some other document in which they are set forth. The whole agreement may be made out by a series of documents, such as the conditions of sale, memorandum and receipt, which bear internal marks of connection, just as in the usual case of a contract founded upon letters: *Nene Valley Drainage Commissioners* v. *Dunkley*, 4 Ch. D. 1; *Long* v. *Millar*, 4 C. P. D. 450; *Shardlow* v. *Cotterell*, 20 Ch. D. 90; *Studds* v. *Watson*, 28 Ch. D. 305. And where an auctioneer entered in his sale book the subject-matter of the sale, the price, and the names of the parties, but omitted any reference to the conditions of the sale, it was held that the contract could not be enforced: *Rishton* v. *Whatmore*, 8 Ch. D. 467; *M'Mullen* v. *Helbery*, 6 L. R., Ir. 463. These details should be attended to in the framing of the memorandum and receipt which are usually endorsed upon the conditions of sale.

Signature by purchaser.

The memorandum must also be signed by the party to be charged therewith, or by his agent properly authorized. For this purpose the auctioneer is the duly accredited agent of both parties, though as a rule the auctioneer's clerk is not: *Coles* v. *Trecothick*, 9 Ves. 234; *Welford* v. *Beazley*, 3 Atk. 503.

The right to object to the note of the contract as being insufficient within the Statute of Frauds may be forfeited if, after discovery of the defect, the purchaser proceeds with the transaction: *Thomas* v. *Brown*, 1 Q. B. D. 714.

PRECEDENTS.

I. *GENERAL CONDITIONS of* SALE *of* FREEHOLDS *or* COPYHOLDS *in* ONE LOT.

1. The highest bidder shall be the purchaser, and if any dispute shall arise respecting any bidding, the property shall be put up again for sale at the last undisputed bidding, or the auctioneer may determine the dispute. Highest bidder to be the purchaser.

2. There will be a reserve price, and the vendor reserves the right of bidding by himself or his agent up to such reserve price. Reserve price (*a*).

3. No person shall advance less than £——— at any bidding, and no bidding shall be retracted. Advance on biddings.

4. The purchaser shall, immediately after the sale, pay to the auctioneer [*or* to Messrs. ———, the solicitors of the vendor] a deposit of 10 per cent. on the amount of the purchase-money, and sign the subjoined agreement. Deposit (*b*).

5. The purchaser shall pay the remainder of the purchase-money at the office of Messrs. ———, the solicitors of the vendor [*or* of the said Messrs. ———], No. —, Lincoln's Inn Fields, and the purchase shall be then and there completed. Completion of purchase.

6. The possession or receipt of the rents and profits of the property shall be retained, and all rates, taxes and outgoings in respect thereof shall be paid and discharged by the vendor, up to the said ——— day of ———, and as from that date the possession or receipt of the rents and profits shall be taken, and the outgoings shall be paid and discharged by the purchaser, and, if necessary, such rents, profits, rates, taxes and outgoings shall for the purposes of this condition be apportioned as between the vendor and purchaser. Possession.

7. If from any cause whatever, other than the wilful default of the vendor, the purchase shall not be completed on or before the said ——— day of ———, the purchaser shall, In case of delay in completion, purchaser to pay interest.

(*a*) See as to biddings and reserve price, stat. 30 & 31 Vict. c. 48 ; and see *ante*, pp. 641 *et seq.*

(*b*) An auctioneer receives the deposit on the sale of a property as a stakeholder, but not so a solicitor who is the vendor's agent and is bound to pay the money over to his principal on demand : *Bamford* v. *Shuttleworth*, 11 A. & E. 926 ; *Edgell* v. *Day*, L. R., 1 C. P. 80.

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as from that day, pay interest (*c*) on the remainder of the purchase-money, and on the amount of the valuation to be made in pursuance of the 14th condition, until the actual completion of the purchase at the rate of ——— per cent. per annum. This provision is without prejudice to any other right or remedy reserved to the vendor by these conditions.

Delivery of abstract.

8. The vendor will, at his own expense, deliver to the purchaser, or to his solicitor, an abstract of title, subject to these conditions (*d*).

Delivery of requisitions.

9. The purchaser shall make in writing his objections and requisitions (if any) in respect of the title, or evidence of title, or the abstract, and send the same to Messrs. ——— within ——— days from the day of delivery of the abstract; and all objections and requisitions which shall not be so made and sent within the time specified shall be deemed to have been waived, and for this purpose time shall be of the essence of the contract; and the abstract, if imperfect, shall be deemed perfect as regards any objection or requisition, upon the subject of which it shall supply proper information.

Power for vendor to rescind sale.

10. In case the purchaser shall make any objection or requisition which the vendor shall, from any cause or on any grounds whatever, be unable or unwilling to answer or comply with, and shall not withdraw the same after being required so to do, the vendor may by notice in writing (notwithstanding any attempt to answer or comply with such objection or requisition, or any previous or pending negotiation or litigation), at any time, rescind the sale. In that case the purchaser shall be entitled only to a return of the deposit money, without interest, costs, or compensation, or other payment whatsoever, in full satisfaction of all claims and demands, and he shall thereupon return all abstracts and documents in his possession belonging to the vendor.

Commencement of title (*e*).

11. The title shall commence with an indenture of mortgage of the property, dated the ——— day of ———, 18—.

Evidence of title, &c.

12. [*Here insert any special condition which may be necessary as to evidence of title, stamps, registration, &c.: see post*, p. 793.]

(*c*) As to payment of interest when completion is delayed, see *ante*, pp. 647 *et seq.*

(*d*) As to fixing a time for delivery of the abstract, see *ante*, p. 655.

(*e*) See as to cases in which it may be necessary to make special provision beyond that contained in sect. 3 of the Conveyancing and Law of Property Act, 1881, *ante*, p. 633. For special conditions, see *post*, p. 776.

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Identity of parcels.

13. The purchaser shall admit the identity of the property sold with that described in the muniments of title offered by the vendor, upon the evidence afforded by a comparison of the descriptions in the particulars and muniments, and such other evidence (if any) as the vendor can supply; the vendor shall not be required to explain or reconcile any differences or discrepancies in the descriptions as to quantity or otherwise [or to distinguish the copyhold from the freehold portions of the property, or the copyhold portions held under different manors].

Timber, &c. to be taken at a valuation (*f*).

14. The purchaser shall take at a fair valuation all timber, and timber like trees, tellers, pollards, and saplings on the property down to the value of one shilling a stick inclusive, and shall pay for the same on completion of the purchase; such valuation to be made by the auctioneer at the joint expense of the vendor and the purchaser.

Charges, &c.

15. The property is sold subject to [all quit and other rents, heriots, and incidents of tenure, and to] all tithe rent-charges (if any) payable in respect of the same, and also subject to all rights of way and water, and all other easements (if any) affecting the same, and to all existing tenancies, and to all such rights as the tenants may have by agreement, custom of the country, or otherwise. [The purchaser shall be deemed to have full notice of the customs of the manors of which the copyhold portions of the property are holden.]

As to errors in description, &c.

16. The admeasurements and descriptions of the property, as given in the particulars, are believed and shall be assumed by the purchaser to be correct; but if any misstatement, error, or omission shall be found in the particulars or conditions, the same shall not annul the sale, nor entitle the purchaser to be relieved from the purchase; nor shall any compensation be allowed to either the vendor or purchaser in respect thereof.

(*f*) It is not unusual to specify in this condition the mode of procedure to be followed in taking the valuation; but it has been held that though a stipulation to take timber, &c. "at a fair valuation," may be enforced, yet if the mode of valuation is specified but not adhered to the Court cannot give relief: *Darby* v. *Whittaker*, 4 Drew. 134. A valuation under conditions of sale is not within the Common Law Procedure Act, 1854, unless special provision is made to that effect: see *ante*, pp. 686, 713. Trustees cannot sell land separately from the timber standing upon it: *Cholmely* v. *Paxton*, 3 Bing. 207; 5 Bing. 48; *S.C.*, *sub nom.*, *Cockerell* v. *Cholmely*, 1 Cl. & F. 60; see *ante*, pp. 687, 731.

I. Freeholds or Copyholds in one Lot.

Conveyance.

17. Upon payment of the remainder of the purchase-money and of the amount payable under the said valuation at the time and in manner hereinbefore provided, the vendor and all other necessary parties (if any) shall make and execute to the purchaser a proper conveyance of the property. Such conveyance shall be prepared by and at the expense of the purchaser, and the engrossment thereof shall be delivered at the office of Messrs. ——— aforesaid, before the ——— day of ——— aforesaid; and a draft of such conveyance shall be left not less than ——— days before the delivery of the engrossment for perusal and approval on behalf of the vendor and any other necessary parties. Every assurance and act (if any) which shall be required by the purchaser for getting in, surrendering or releasing any outstanding estate, right, title or interest, or for completing or perfecting the vendor's title, or for any other purpose, shall be prepared, made and done by and at the expense of the purchaser, and the expense of the perusal on behalf of, and execution by all parties other than the vendor of all conveyances or assurances, shall be borne by the purchaser.

Special conditions as to conveyance.

18. [*Here insert any special conditions as to the form or contents of the conveyance, post*, p. 823.]

As to custody of deeds.

19. The vendor shall retain all deeds and other documents which relate as well to other property as to the property offered for sale, and shall give to the purchaser a statutory acknowledgment of the right of the purchaser to production of such deeds and documents, and to delivery of copies thereof, and also a statutory undertaking for the safe custody thereof (*g*).

On default of purchaser, vendor may resell.

20. If the purchaser shall neglect or fail to comply with any of the above conditions his deposit-money shall be forfeited to the vendor, who may, with or without notice, and without tendering a conveyance to the defaulter at the present sale, resell the property, either by public auction or private contract, at such time and place, and subject to such conditions and in such manner generally as the vendor shall think fit, and if such resale shall be by auction, the property may be bought in, and the deficiency of price (if any) which

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(*g*) As to the expenses of preparation, perusal and execution of such acknowledgments and undertakings, see the Vendor and Purchaser Act, 1874, s. 2, sub-s. 4, *ante*, pp. 634, 725, and Vol. I. tit. ACKNOWLEDGMENTS, p. 256.

I. Freeholds or Copyholds in one Lot.

shall happen on any such resale, and the expenses of and incident to the present sale or such resale, or any unsuccessful attempt to resell, shall forthwith respectively be made good (*h*), and be paid to the vendor by the purchaser at the present sale, and in case of nonpayment the whole of such deficiency and expenses, or such part thereof respectively as shall not be paid, shall be recoverable by the vendor as liquidated damages.

MEMORANDUM OF CONTRACT (*i*).

I [*purchaser*], of &c., hereby acknowledge that at the sale by auction held this ——— day of ———, 18—, I was the highest bidder for and was declared the purchaser of the property mentioned in the foregoing particulars, subject to the foregoing conditions, at the price of £———, and that I have paid the sum of £——— by way of deposit, and in part payment of the said purchase-money, to Mr. ———, and hereby agree to pay the remainder of the said purchase-money, and complete the said purchase according to the aforesaid conditions.

As witness my hand, this ——— day of ———, 18—.

(*Signature of purchaser.*)

Purchase-money .	£	:	:
Deposit	£	:	:
Balance . . .	£	:	:

As agent for [*vendor*] the vendor, I hereby confirm this sale, and acknowledge the receipt of the deposit above mentioned.

(*Signature of auctioneer.*)

Abstract to be sent to Messrs. ———.

(*h*) Where there was a stipulation on a sale that if the purchaser should neglect or fail to comply with the conditions the vendor might resell, that the deposit which had been paid by the purchaser should be forfeited, and that any deficiency in the price on the resale should be made good, it was held that the vendor was entitled to retain the deposit, and also to recover the expenses of the abortive sale, and the costs of preparing to complete the same, without putting the property up again for sale: *Daniel* v. *Essex*, L. R., 10 C. P. 538.

(*i*) This memorandum may be thus adapted for the purposes of a sale by private contract, subject to the foregoing conditions:

I [*purchaser*], of &c., hereby acknowledge that I have become the purchaser . . . . according to the aforesaid conditions, so far as the same are applicable to a sale by private contract.

II. *GENERAL CONDITIONS of* SALE *of* FREEHOLDS *or* COPYHOLDS *in several* LOTS.

Conduct of sale.

1. The highest bidder for each lot shall be the purchaser thereof, and if any dispute shall arise respecting any bidding for any lot, such lot shall be put up again for sale at the last previous and undisputed bidding, or the auctioneer may determine the dispute.

Reserve price.

2. There will be a reserve price for each lot, and the vendor reserves the right of bidding himself, or by his agents, as often as he may think proper.

Biddings.

3. No person shall advance less than £——— at any bidding, or such other sum as shall be named by the auctioneer, and no bidding shall be retracted.

Payment of deposit.

4. Every purchaser shall, immediately after the sale, pay to the auctioneer [*or* to Messrs. ———, the solicitors of the vendors] a deposit of 10 per cent. on the amount of his purchase-money, and sign an agreement in the form indorsed on these conditions.

Completion of purchase.

5. Every purchaser shall pay the remainder of his purchase-money on the ——— day of ———, 18—, at the office of Messrs. ———, the solicitors of the vendor, No.—, ——— Street [*or* office of Messrs. ——— aforesaid], and the purchases shall be then and there completed.

Possession.

6. The possession or the receipt of the rents and profits of all the property shall be retained, and all rates, taxes, and outgoings up to that time not payable by the tenants shall be discharged by the vendors up to the said ——— day of ———, and as from that date possession or receipt of the rents and profits of each lot shall be taken, and the outgoings paid and discharged by the purchaser thereof, and, if necessary, such rents, profits, rates, taxes, and outgoings shall for the purposes of this condition be apportioned as between the vendor and the respective purchasers.

In case of delay purchasers to pay interest.

7. If, from any cause whatsoever, other than the wilful default of the vendor, the completion of the purchase of any lot shall be delayed beyond the said ——— day of ———, the purchaser thereof shall pay interest on the remainder of his purchase-money [and on the amount of the valuation to be made as provided by the 14th condition] at the rate of ——— per cent. per annum, from that day till the day of actual payment thereof. This provision is without prejudice to any right or remedy reserved to the vendor by these conditions.

II. Freeholds or Copyholds in several Lots.

Delivery of abstract.

8. The vendor will, at his own expense, deliver to each purchaser or his solicitor an abstract of title, subject to these conditions, to the lot or lots purchased by him [but no purchaser of two or more lots held under the same title shall be entitled to more than one abstract of the common title, except at his own expense (*a*)].

Time for delivery of requisitions.

9. Every purchaser shall make his objections and requisitions (if any) in respect of the title or evidence of title, or the abstract, and send the same to Messrs. ——— within ——— days from the day of delivery to him or his solicitor of his abstract; and all objections and requisitions which shall not be so made and sent within the time specified shall be taken to be waived, and for this purpose time shall be of the essence of the contract. Every abstract, if imperfect in any particular, shall be deemed perfect as regards any objection or requisition upon the subject of which it shall supply proper information.

Power to rescind.

10. In case any purchaser shall make any objection or requisition which the vendor shall be unable or unwilling to answer or comply with, and shall not withdraw the same after being required so to do, the vendor may, by notice in writing (notwithstanding any attempt to answer or to comply with such objection or requisition, or any previous or pending negotiation or litigation), rescind the contract for sale upon repaying or tendering to such purchaser the deposit-money, without interest, costs, or expenses, in full discharge and satisfaction of all claims or demands, and such purchaser shall thereupon return all abstracts and documents in his possession belonging to the vendor.

Commencement of title.

11. The title to all the lots except lot 4 shall commence with a conveyance of the property sold [with other premises], dated the ——— day of ———, 18—, and expressed to be made between [*parties*]. The title to lot 4 shall commence, &c. [*For special conditions, see post*, p. 782].

12. [*Here insert any special conditions as to evidence of title, stamps, registration, &c., post*, p. 793.]

Identity of parcels.

13. Every purchaser shall admit the identity of the property bought by him with that described in the muniments of title thereof offered by the vendor, upon the evidence afforded by a comparison of the descriptions in the particulars and muniments, and such other evidence (if any) as the vendor can supply; the vendor shall not be required to explain or reconcile

(*a*) The words in brackets are merely declaratory and may be omitted if desired: see *ante*, p. 656.

II. Freeholds or Copyholds in several Lots.

any differences or discrepancies in the descriptions as to quantity or otherwise [or to distinguish the copyhold from the freehold portions of the property, or the copyhold portions held under different manors].

Timber, &c. to be taken at a valuation.

14. Every purchaser shall take at a fair valuation all timber and timber-like trees, tellers, pollards, and saplings on the lot or lots purchased by him, down to the value of one shilling a stick inclusive, and shall pay for the same on the completion of the purchase; such valuation to be made by the auctioneer at the joint expense of the vendor and the respective purchasers.

Charges, &c.

15. Each lot is sold subject to [all quit and other rents, heriots, and incidents of tenure, and to] all tithe rent-charges (if any), and other outgoings issuing out of, or charged upon, or payable in respect of the same, and also subject to such rights as the tenants may have by agreement, custom of the country, or otherwise. [The purchasers shall be deemed to have full notice of the customs of the manors of which the copyhold portions of the property are holden.]

As to errors in description, &c.

16. The admeasurements and descriptions of the several lots as given in the particulars are believed and shall be assumed by the respective purchasers to be correct, but if any misstatement, error, or omission as respects any lot shall be found in the particulars or conditions, the same shall not annul the sale of such lot nor entitle the purchaser of such lot to be relieved from his purchase; nor shall any compensation be allowed to either the vendor or purchaser in respect thereof.

Preparation and execution of conveyance.

17. Upon payment by each purchaser of the remainder of his purchase-money, and of the amount payable by him under the said valuation, at the time and in manner aforesaid, the vendor and all other necessary parties (if any) shall make and execute to him a proper conveyance, or proper conveyances, of the lot or lots purchased by him. Such conveyances shall be prepared by, and at the expense of respective purchasers, and the engrossments thereof respectively shall be delivered at the office of Messrs. ———, aforesaid, before the ——— day of ———, aforesaid; and a draft of every such conveyance shall be left not less than ——— days before the delivery of the engrossment, for perusal and approval on behalf of the vendor and any other necessary parties. Every other assurance and act (if any) which shall be required by any purchaser for getting in, surrendering, or releasing any outstanding estate, right, title, or interest, or for completing or perfecting the title of the vendor to any

lot or lots, or for any other purpose, shall be prepared, made, and done at the expense of the purchaser requiring the same; and the expense of the perusal on behalf of and execution by all parties, other than the vendor, of all conveyances or assurances shall be borne by the respective purchasers. II. Freeholds or Copyholds in several Lots.

18. [*Here insert any special conditions as to the form and contents of the conveyance, post*, p. 823.]

19. The purchaser of the largest part in value of the property held by the same title shall be entitled, after the completion of the sale of all such property, to the custody of such of the muniments of title comprising the same as are in the vendor's possession, and shall give to the purchaser or purchasers of the other parts of the same property a statutory acknowledgment of his or their right to production and delivery of copies of such muniments, and a statutory undertaking for the safe custody thereof. If any part of such property shall not be sold at this sale the vendor shall retain the said muniments until all such property shall be sold, and the purchasers of the lots sold shall in the meantime be entitled, at their own expense, to the production of such muniments and to copies of them, but not to any acknowledgment or undertaking in respect thereof. The vendor shall retain such of the muniments of title in his possession as relate to any of the property offered for sale, and also to other property not included in the sale, and will give to the purchasers of any part of the property comprised in such last-mentioned muniments, a statutory acknowledgment of the right to production and delivery of copies thereof, and [*or* but not] a statutory undertaking for the safe custody thereof (*b*). All acknowledgments and undertakings which shall be required under any provision of this condition shall be prepared by and at the expense of the purchaser or purchasers requiring the same, and if given by the vendor shall be made determinable on the vendor parting with the muniments therein referred to and procuring (without expense to the purchaser), the person or persons to whom such muniments shall be delivered to give similar acknowledgments and undertakings to the purchasers or the persons for the time being entitled to the benefit of the vendor's acknowledgments and undertakings. Custody of documents of title.

20. Nothing contained in any of these conditions shall Completion not to be de-

(*b*) If the vendor is a trustee or mortgagee, the obligation to give an undertaking by him will be negatived. See *ante*, Vol. I. tit. Acknowledgments, p. 236, and *ante*, p. 722.

II. Freeholds or Copyholds in several Lots.

entitle any purchaser to delay the completion of his own purchase on account of any delay in the completion of the purchase of any other lot or lots, or to require any covenant for or acknowledgment of right to production of any copy of or extract from the conveyance of any other lot or lots.

layed as to one lot pending completion as to others, &c.

Power for vendor to resell on default of any purchaser.

21. If any purchaser shall neglect or fail to comply with the above conditions his deposit-money shall be forfeited to the vendor, who shall be at liberty, with or without notice, and without previously tendering a conveyance to the defaulter at the present sale, to resell the lot or lots in respect of which such default shall occur, either by public auction or private contract, at such time and place, and subject to such conditions and in such manner generally as the vendor shall think fit; and if such resale shall be by auction the property then offered for sale may be bought in, and the deficiency of price (if any) which shall happen on such resale, and the expenses of and incident to the present sale or such resale, or any unsuccessful attempt to resell, shall forthwith respectively be made good (*c*), and such expenses as shall not be paid shall be recoverable by the vendor as liquidated damages.

MEMORANDUM OF CONTRACT (*to be indorsed*).

Memorandum of contract.

I [*purchaser*], of &c., hereby acknowledge that at the sale by auction held this ——— day of ———, 18—, I was the highest bidder for and was declared the purchaser of Lot ———, described in the within particulars, subject to the within conditions, at the price of £———, and that I have paid the sum of £——— by way of deposit and in part payment of the said purchase-money, to Messrs. ———, and hereby agree to pay the remainder thereof and complete the said purchase according to the aforesaid conditions.

(*Signature of purchaser.*)

As witness my hand this ——— day of ———, 18—.

Purchase-money .	£	:	:
Deposit	£	:	:
Balance . . .	£	:	:

As agent for [*vendor*], the vendor, I hereby confirm this sale on the within conditions, and acknowledge the receipt of the deposit above mentioned. (*Signature of auctioneer.*)

Abstract of title to be sent to Messrs. ———.

(*c*) See *ante*, p. 743, n. (*h*).

III. *CONDITIONS OF SALE of a* Leasehold Town House.

1. The highest bidder shall be the purchaser; and if any dispute shall arise as to the last or highest bidder, the property shall be put up at the last previous bidding. The vendors reserve the right of bidding for the property by themselves or their agents. Conduct of sale. Right to bid reserved.

2. The biddings shall be regulated by the auctioneer, and no person shall retract a bidding. Biddings not to be retracted.

3. The purchaser shall, immediately after the sale, pay a deposit of 10 per cent. on his purchase-money to the auctioneer, and sign the subjoined agreement. Deposit.

4. The fixtures and fittings specified in the inventory thereof, to be produced at the sale (*d*), shall be taken and paid for by the purchaser at a price to be declared by the auctioneer at the time of sale, or at a valuation to be made by two persons, one of whom shall be named by either party, and his nomination notified in writing to the other party within seven days from the day of sale, or by an umpire to be appointed by the valuers, but if either the vendors or purchaser shall refuse or neglect to name a valuer, or to notify his nomination as aforesaid, or if the valuer named by either party shall refuse or neglect to act, then the valuation shall be made by the valuer (if his nomination shall have been duly notified as aforesaid) of the other party alone. Fixtures.

5. The purchaser shall pay the balance of his purchase-money and the amount of the said valuation on the ——— day of ——— next, at the office of Messrs. ———, the vendors' solicitors, at which time and place the purchase is to be completed, and as from that day the outgoings shall be discharged and possession taken by the purchaser. All outgoings payable by the vendors up to that time will be discharged by them, and the rents and outgoings shall, for the purpose of this condition, be apportioned respectively. If from any cause whatever the purchase shall not be completed on the said ——— day of ——— next, the purchaser shall pay interest on the balance of his purchase-money and the amount of the said valuation, at the rate of 5 per cent. per annum, Completion and possession.

(*d*) Where the fixtures are of a costly nature the inventory should be deposited at the office of the solicitors, or some other convenient place, for inspection by intending purchasers. See *ante*, p. 684.

III. Leasehold Town House.

from that day until the day of completion. This provision is without prejudice to the right reserved to the vendors by any other of these conditions.

Delivery of abstract. Requisitions.

6. The vendors will, at their own expense, deliver an abstract of their title to the purchaser, and, within ten days after the actual delivery of the abstract, all objections and requisitions in respect of the title as deduced thereby, which the purchaser shall, having regard to these conditions, be entitled to raise or make, shall be delivered in writing at the office of Messrs. ———, and the title shall be considered as finally accepted at the expiration of such ten days, subject to such objections and requisitions as shall be delivered within that time, and in this respect time shall be the essence of the contract.

Rescission.

7. If any objection or requisition whatsoever shall be made by the purchaser as to the title, particulars, conditions, or any other matter or thing relating or incidental to the sale which the vendors are unable or unwilling to comply with, the vendors (notwithstanding any treaty, discussion, or litigation in reference thereto, or any attempt to remove or comply with the same), shall have full power to annul the sale upon returning to the purchaser the amount of his deposit, in full satisfaction of all his claims, and without payment of interest, costs or compensation; and the purchaser shall thereupon return to the vendors the abstract of title and other papers which may have been delivered to him or his solicitor by the vendors, but the purchaser may, within seven days from the time of the vendors giving notice of annulment, elect to waive the objection or requisition, and take the property subject thereto.

Commencement of title (*e*).

8. The title shall commence with an indenture of lease dated the ——— day of ———, 18—, and expressed to be made between ——— of the one part, and ——— of the other part, and the purchaser shall make no objection that the same is an underlease, nor shall he inquire into the title anterior thereto.

Repairs and insurance.

9. The purchaser shall take the house in its present condition, and [the receipt for the last payment of rent accruing due before the completion of the purchase shall be conclusive evidence that all the covenants and conditions contained in the lease have been observed and performed up to the completion

(*e*) This condition is framed on the assumption that the vendors are prepared to produce the original lease. See *ante*, p. 672.

of the purchase, or that all breaches (if any) of such covenants and conditions have been waived. The purchaser (*f*)] shall take over the policy of insurance against fire, and shall pay a proportion of the premium from the day of sale.

Conveyance.

10. Upon payment of the balance of his purchase-money and the amount of the said valuation, at the time and place aforesaid, the vendors and all other necessary parties (if any) shall execute a proper assignment to the purchaser, which shall be prepared by and at the expense of the purchaser, and shall be tendered or left at the office of Messrs. ——— for execution by the vendors, five days before the time appointed for completion. Such assignment shall contain a covenant by the purchaser for the payment of the rent and the observance and performance of the covenants and conditions contained in the said indenture of lease, and for keeping the vendors indemnified against all actions for the non-payment of the said rent, and the breach, non-observance and non-performance of the said covenants and conditions; and the purchaser shall also (if required) execute and deliver to the vendors a duplicate of the assignment, such duplicate to be engrossed by the vendors at their own cost.

Covenants by vendors.

11. The vendors are trustees, and will only give the usual covenant against incumbrances implied by their being expressed to convey as trustees (*g*).

Power to sell on default.

12. If the purchaser shall neglect or fail to comply with the above conditions, or any of them, his deposit-money shall be forfeited to the vendors, who shall be at liberty to resell the property, either by public auction or private contract, and at such time and subject to such conditions, and in such manner in all respects as the vendors shall think proper; and any deficiency in price on such second sale, together with all costs attending the same shall, immediately after such second sale, be made good to the vendors by the defaulter at this present sale, and in case of non-payment shall be recoverable by the vendors as liquidated damages.

MEMORANDUM (*ante*, p. 743).

(*f*) The words in brackets may be omitted, and the statutory condition (as to which see *ante*, p. 678) may be relied upon if desired; but the protection given to the vendor by the condition in the text will probably be found to be more complete and effectual where it is apprehended that a breach of covenant may have been committed. No condition will, however, avail against misrepresentation, or wilful concealment. See *ante*, p. 679.

(*g*) As to the value of this condition, see *ante*, p. 716.

IV. *CONDITIONS OF SALE of* LEASEHOLDS, *in Lots.*

Conduct of sale.

1. The highest bidder for any lot shall be the purchaser, and if any dispute arise between two or more bidders the dispute in question shall be settled by the auctioneer. No person shall advance at any bidding less than 10*l.*, nor retract his bidding. The vendors reserve their right to bid.

Right to bid reserved.

Deposit.

2. Each purchaser shall immediately after the sale pay to the auctioneer a deposit of 10 per cent. upon the amount of his purchase-money to the auctioneer, and sign the subjoined agreement.

Completion.

3. The purchaser of each lot shall pay the remainder of his purchase-money on the ——— day of ——— next, at the office of the vendors' solicitor, Mr. ———, No. —, ——— Road, at which time and place the purchase shall be completed. Each purchaser who shall pay his purchase-money shall as from that day be entitled to the improved rents and profits, and all rent, rates, taxes and outgoings are (if necessary) to be apportioned up to that day, and each purchaser shall on completion pay to the vendors, in addition to the remainder of the purchase-money, the proportion of tenants' rents accrued since the last payment of rent up to the said ——— day of ——— next, and all outgoings up to that day shall be paid or allowed by the vendors. If from any cause whatever the purchase of any lot shall not be completed on the said ——— day of ———, the purchaser

Interest.

thereof shall pay to the vendors interest after the rate of 6 per cent. per annum on the remainder of his purchase-money from that day until the completion of his purchase.

Delivery of abstract.

4. The vendors will, at their own expense, deliver to each purchaser an abstract of the title to the lot or lots purchased by him. All objections and requisitions in respect of the title of any of the lots, or the abstract, or particulars, or anything appearing therein respectively, shall be stated in writing and sent to the vendors' solicitor within ten days from the delivery of the abstract, and all objections and requisitions not sent within that time shall be considered to be waived, and in this respect time shall be deemed to be the

Power to rescind.

essence of the contract. If any objection or requisition shall be made, which the vendors shall be unable or unwilling to

IV. Leaseholds in Lots.

remove or comply with, the vendors shall be at liberty (notwithstanding any intermediate negotiation on the subject of such objection or requisition or any attempt to remove or comply with the same), by notice in writing to the purchaser by whom such objection or requisition shall be made, to rescind the sale, in which case such purchaser shall receive back his deposit without interest, but shall have no claim on the vendors for the expense of investigating the title or other expenses or for compensation.

Commencement of title.

5. The abstract of title to each lot shall commence with the lease or underlease (as may be) under which the vendors hold such lot, and the purchaser shall not require the production of or inquire into or make any objection in respect of the title of the lessor or sublessor (as may be) or any other previous title. The receipt for the last payment of the rent due under each such lease or underlease will be produced to the purchaser, and the same shall be deemed sufficient and conclusive evidence that all covenants and conditions in such lease or underlease and to be performed by the lessee have been duly performed, or any breach thereof waived up to the completion of the purchase, and the purchaser of the property held thereunder shall assume that the person by whom such receipt is given is the rightful owner of the reversion expectant on such lease or underlease without any proof of the devolution of the title to him from the original lessor or sublessor (*a*).

Leases deposited for inspection.

6. The several leases and underleases with which the title to each lot is to commence, and the counterparts of the several tenants' leases, may be inspected, and any information obtained thereon, at the office of the vendors' solicitor, at No. —, ——— Road, aforesaid, seven days prior to the day of sale, and will be produced at the sale. The several purchasers shall be deemed to have bought with full notice of the contents thereof, and also of the state of the premises purchased, which may be viewed prior to the sale, whether he shall have inspected or viewed the same or not, and shall make no objection or requisition in respect of anything contained in such deeds or documents or omitted therefrom or as to the state of the premises.

Special conditions as to alterations in property.

7. Certain alterations to the premises comprised in lot 5, including openings into the adjoining premises, No. —, ———

(*a*) With respect to this clause, see *ante*, p. 680.

IV. Leaseholds in Lots.

Street, were made many years ago, and the present tenants have entered into a covenant to restore the premises to their original state and condition before the expiration of their term if previously required so to do. It shall be assumed that these alterations were consented to by the vendors' lessors and the lessors of the ——— Street premises, and that the covenant prohibiting them has been effectually waived.

As to property comprised in bequest.

8. It is to be assumed that the bequest to the vendors' testator, of No. —, ——— Street, included the stable in the rear thereof.

As to non-execution of a lease, and as to stamps, &c.

9. No objection shall be taken on account of the lease under which the vendors hold the premises comprised in lot 5 not having been executed by one of the demising parties thereto, nor on account of any document being unstamped or insufficiently stamped or not being registered in the Middlesex registry.

As to variations in covenants between leases and sub-leases to tenants.

10. No purchaser shall make any objection or requisition on the ground of any discrepancy or variation between any of the covenants or conditions in the respective leases and underleases under which the vendors hold and the tenants' leases.

Identity.

11. The purchaser of each lot shall admit the identity of the property purchased by him with that comprised in the muniments offered by the vendors as the title to such property, upon the evidence afforded by a comparison of the descriptions in the particulars and muniments, and the vendors shall not be required to explain or reconcile any differences or discrepancies in the descriptions.

Compensation, easements, &c.

12. All the lots are believed and shall be taken to be correctly described in the particulars as to quantity, term and otherwise, and are sold subject to all rights of way and water and other easements (if any), and to all existing tenancies; and if any error, misstatement, or omission in the particulars be discovered, the same shall not annul the sale, nor shall any compensation be allowed by the vendors to any purchaser in respect thereof.

Completion and conveyance.

13. Upon payment by the purchaser of any lot of the remainder of his purchase-money at the time and place aforesaid, the vendors and all other necessary parties (if any) will execute a proper assignment to him of such lot, but such assignments shall be prepared by and at the expense of the respective purchasers, and shall be tendered or left at

IV. Leaseholds in Lots.

the office of Mr. ——— for execution by the vendors fourteen days before the time appointed for completion. Every purchaser shall, in the assignment to him, covenant with the vendors for the payment of the rent and the observance and performance of the covenants and conditions contained in the lease of the property purchased by him, and for indemnifying the vendors against all actions for the nonpayment of the said rent, and the breach, non-observance and non-performance of the said covenants and conditions, and shall also (if required) execute and deliver to the vendors a duplicate of the assignment, such duplicate to be engrossed by the vendors at their own cost.

Special condition as to conveyance of one lot.

14. Part of the property comprised in lot 3 is held under the underlease of lot 1. The purchaser of lot 1 shall take an assignment of the premises comprised in the said underlease, and shall execute to the purchaser of lot 3 an underlease of such part of the premises forming part of that lot as is comprised in the said underlease of lot 1 for the whole term wanting five days at a peppercorn rent, such underlease to contain covenants, provisoes and conditions similar in all respects to the underlease of lot 1. If either lot remains unsold, the vendors shall for the purpose of this condition stand in the place of the purchaser of such lot. The purchaser of lot 3 shall execute a counterpart of his lease, and all instruments required by this condition shall be prepared by the solicitor of the vendors at the expense of the purchaser of lot 3.

Vendors' covenants.

15. The vendors, being executors, will only give the statutory covenant against incumbrances implied by reason of their being expressed to convey as personal representatives.

Custody of deeds.

16. Such of the muniments of title as relate to more than one lot shall, if all the lots to which the same relate be sold at this auction, be delivered to the purchaser of the largest part in value of such lots, and he shall give to the purchasers of the others of such lots the proper statutory acknowledgment of their right to production and to delivery of copies thereof, and also the proper statutory undertaking for safe custody thereof. If all the lots to which any muniments relate are not sold at this auction, such muniments shall be retained by the vendors, and they shall give to the purchasers of such of the same lots as are sold, the before-mentioned statutory acknowledgment, but

IV. Leaseholds in Lots.

not the undertaking (*b*). If any documents of title in the vendors' possession relate to the property now offered for sale, as well as to other property not the subject of this sale, such documents will be retained by the vendors, who will give the statutory acknowledgment to the purchaser requiring the same, but not the undertaking. Every acknowledgment and undertaking given under this condition is to be prepared and approved on behalf of all parties thereto at the expense of the persons to whom it is given.

Power of re-sale in default.

17. If any purchaser shall fail to comply with these conditions, his deposit-money shall be forfeited to the vendors, and they shall be at liberty, with or without notice, and without previously tendering a conveyance, to resell the property sold to him either by public auction or by private contract, and the deficiency (if any) arising on such second sale, together with all expenses attending the same, shall be made good by the purchaser at this present sale, and shall be recoverable by the vendors as liquidated damages.

MEMORANDUM OF CONTRACT (*ante*, p. 748).

V. *CONDITIONS OF SALE of a* COLLIERY *as a going Concern.*

Conduct of sale.

1. The highest bidder shall be the purchaser, and if any dispute shall arise as to the last or best bidding, the property shall be put up again at a former bidding.

Biddings.

2. No person shall advance less at each bidding than such sum as shall from time to time be named by the auctioneers, nor retract his bidding after it has been taken by the auctioneers. The vendors reserve the right to bid.

Right to bid reserved.

Deposit and completion.

3. The purchaser shall, immediately after the sale, pay to the auctioneers a deposit of 10 per cent. on the amount of his purchase-money, and sign the subjoined agreement No. 1, for payment of the remainder and for completion of his purchase at the ——— Hotel, in the City of ———, on the ——— day of ——— next, from which time the purchaser shall be entitled to the possession or receipt of the rents and profits of the property, and all outgoings to that time shall be cleared by the vendors, except the dead rents payable to the Crown, which shall be paid by the

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(*b*) See *ante*, p. 747, n. (*b*).

purchaser, he having the right to recoup himself such payment of dead rent out of future surplus workings. For the purpose of this condition, all accruing rents (except dead rents) shall be apportioned between the vendors and purchaser. Should the completion of the purchase be delayed beyond the said ——— day of ——— next from any cause whatever, the purchaser shall pay interest at the rate of 6 per cent. per annum on the remainder of the purchase-money from that time to the time of completion, and shall, in the event of his not entering into the subjoined agreement No. 2, also pay from the said ——— day of ——— next the cost of pumping and maintaining the said works, should the vendors think fit to waive the right reserved to them by condition 17.

V. Colliery as a going Concern.

Interest.

4. The vendors will, at their own expense, deliver to the purchaser or his solicitor an abstract of the title to the property, subject to these conditions. The purchaser shall, within fourteen days after the actual delivery of the abstract, deliver at the office of Messrs. ———, solicitors, ———, in the county of ———, a statement in writing of his objections and requisitions (if any) to or on the title as deduced by such abstract, whether perfect or not, and upon the expiration of such last-mentioned time (and in this respect time is to be deemed of the essence of the contract) the title is to be considered as approved of and accepted by the purchaser, subject only to such objections and requisitions (if any); and if the purchaser shall make any objection or requisition which the vendors shall be unable or unwilling to remove or comply with, the vendors shall be at liberty, notwithstanding any intermediate negotiations or attempts to remove or comply with such objection or requisition, to cancel the contract, which shall thereupon be delivered up and the deposit returned without interest and without costs on either side, and all documents delivered by either party to the other party shall be returned.

Delivery of abstract, requisitions, &c.

Power to rescind.

5. The title to the property (save as to certain small parts hereinafter mentioned, and leases or licences) shall absolutely commence with the award in 18— of the —— Commissioners, which shall be considered and taken as correct and sufficient in all respects, without reference to or objection concerning any Act of Parliament, or other matters therein mentioned or referred to, or relating to the premises, and shall be considered to have conferred a fee simple or other like descen-

Commencement of title.

V. Colliery as a going Concern.

dible estate on the persons found entitled by such award, except as therein otherwise expressly stated, subject to the rents, renders, rules, and regulations therein reserved and contained (the subsequent alterations in which shall also be considered good and sufficient) with respect to such property without the production of or necessity for any gales or grants in pursuance of or as recognized by or mentioned in such award, whether previous or subsequent thereto, and without the production of any previous title in the persons so found entitled, whether in the vendors' possession or power or not, and whether subsequently referred to or covenanted to be produced or not, or any then existing or antecedent incumbrances, which, if not shown to have been satisfied, shall be assumed to have been satisfied, and the estate or interest thereby affected got in, and particularly with respect to any terms of years existing in the property or any part thereof which shall not now be got in or further dealt with, whether actually attending the inheritance or not, and any claim, estate, or interest mentioned in the award and not subsequently dealt with in the title shall be assumed to be at an end, or not really to have existed.

As to equitable title to family incumbrances.

6. As to parts of the property, family and other incumbrances have existed as to which there have been numerous dealings with or affecting the equitable title which shall not now be required to be evidenced, or objected to, the incumbrances themselves having been discharged many years since, and all recitals, and statements in deeds and documents previous to the discharge of such incumbrances, whether of documents or otherwise, shall be considered as sufficient evidence thereof, when not otherwise proved, and no documents or matters not clearly relating to the property, or only affecting the same incidentally, shall be required to be produced or enquired into, and all dealings by public companies or bodies, or those professing to represent them, shall be considered good and sufficient without proof, and an agreement in 18— to supply coal from part of the property shall be considered to have ceased.

Title to part: succession duty.

7. As to ——— gale, the title after the award shall absolutely commence with deeds of 18— and 18— respectively with respect to any interests the previous or intervening title to which is not in the vendors' possession, and no succession duty payable on the cesser of any such interest shall now be inquired into.

V. Colliery as a going Concern.

8. As to ——— gale, the title after the award shall absolutely commence with a deed in 18—, and the fact of the award only mentioning a leasehold interest shall not be objected to, and litigation alluded to as taking place as to adjoining works about 18—, but afterwards settled, shall not now be inquired into.

Title to part: variance in tenure: old litigation.

9. As to the ——— gale, 2-12th parts and 1-24th part are shown by the award to have been held by a lease for ——— years which expired in 18—, and no title is shown as to one other 1-24th part, in respect of which it does not appear that any claim was made at the time of the award or since. No objection or requisition shall be taken or raised in respect of these interests.

Title as to part: no title.

10. As to the small freehold properties all originally derived from the Crown, the title thereto respectively shall absolutely commence with deeds of 18—, 18—, 18—, and 18—, which shall be considered good and sufficient in all respects, notwithstanding any acts or matters therein mentioned, and no earlier title shall be required or inquired into or objected to, whether appearing or not.

Title as to other parts.

11. The landlord's title as to the several leases and licences from the Crown, or otherwise, shall not be required or objected to, and the production of the receipt for ground or other rent from the lessor or agent (of which character of lessor or agent no evidence shall be required) shall be conclusive evidence that all arrears of ground or other rents have been paid, and that the covenants and conditions in the leases or licences have been duly performed and observed on the part of the lessees, licensees, or grantees, or those claiming under them, or that any breaches thereof have been waived; and where any breach shall be taken as waived under the present condition, no objection shall be made by reason of any continuing breach of the same or the like covenant or condition for the period subsequent to such last receipt up to the completion of the purchase (*a*).

Title to leases and mining licences from Crown: receipt for rents.

12. All recitals and statements in deeds or other documents dated more than ——— years since shall be conclusive evidence of the matters or things so recited or stated or thereby implied (*b*) [and all attested, office, or other copies, abstracts or extracts of or from any deeds, wills, proceedings in Chancery,

Recitals to be evidence.

(*a*) See *Laurie* v. *Lees*, 7 App. Cas. 19; and *ante*, p. 679.
(*b*) As to the effect of this provision, see *ante*, p. 675 *et seq.*

V. Colliery as a going Concern.

parochial or public registers, or other documents, and all evidences of deaths of parties, intestacy, heirship or kinship, or other matters of pedigree, or of identity of parties or parcels, and generally all documentary and other evidence, and any information not within the vendors' knowledge, called for by the purchaser, shall, whether required for verification or completion of the abstract or delivery to the purchaser, or for any other purpose, be had and obtained at the expense of the purchaser (*c*)], and all documents (if any) required by the purchaser to be registered, enrolled, or stamped shall be so registered, enrolled, or stamped at the purchaser's expense, and if such registration, enrolment, or stamping cannot now be effected, or shall have been improperly done, or not done at all, the want thereof shall form no objection to the title, and the tracing and getting in of outstanding estates or interests (if any) and the obtaining any vesting or other order, if required, as to any estates or interests, and the production of all documents not in the vendor's possession, wherever the same may be deposited, shall respectively be obtained at the purchaser's expense, and no inquiry or objection shall be made as to any right to dower of the wife or widow of any former owner of the property or any part thereof or share therein.

Stamps, &c.

Outstanding estates.

Production of deeds.

Dower.

Identity.

13. Should any question arise as to the identity of the premises described in the particulars with the premises described in the documents abstracted, the purchaser shall be furnished at his expense with a declaration that the premises have been held in conformity with the title as deduced for ——— years last past, except in cases where the title is by these conditions limited to commence at a shorter date than ——— years, and in such cases for the period for which the title is shown, and thereupon the requisition in respect of identity shall be considered as satisfied. The property is sold subject to all general laws and customs of the district, including all existing and future claims for compensation, if any, by owners of the surface or of adjoining mines and minerals, and such of the property as does not consist of mineral property is sold subject to all existing reservations and exceptions of minerals and of rights connected therewith. And all the property is sold subject also to such tenancies,

Liabilities subject to which the property is sold.

(*c*) The statutory condition may, if desired, be relied upon in place of the words in brackets. For a full consideration of this question, see *ante*, p. 674. Declaratory conditions are, however, sometimes not without their use.

rights of way, light, support, and water, and other like rights and easements as may affect the same, and the purchaser shall be taken to have notice thereof, though not expressly mentioned.

Compensation by arbitration.

14. If any error or misstatement shall appear to have been made in the annexed particulars or these conditions, such error or misstatement is not to annul the sale, or entitle the purchaser to be discharged from his purchase, but a compensation is to be made to or by the purchaser, as the case may be, and the amount of such compensation is to be settled by arbitration.

Covenants in conveyance.

15. The purchaser shall either in his assurance or separately, if the vendors shall think fit, and in the latter case at the vendors' expense, save as to perusal and execution by the purchaser, covenant with the vendors to pay and perform and indemnify them against all rents, covenants, and provisions in the award, leases and licences and obligations of a similar character attaching to the property or the vendors in respect thereof.

Custody of deeds.

16. Documents of title (if any) relating to the premises sold, and also to other property or matter, shall be retained by the vendors, or the party or parties entitled thereto, but such acknowledgments of the right to production and delivery of copies thereof, and undertaking for the safe custody thereof, limited to the time of holding the same, shall be given as can be procured; but documents of title relating exclusively to the premises sold, shall, if in the vendors' possession, be delivered to the purchaser, and every acknowledgment and undertaking under the present condition shall be prepared by and at the expense of the purchaser, but shall be perused and executed by the person giving the same at his own expense, and no purchaser shall object to the absence of any sufficient covenant or to any existing covenant for production of documents.

Power to re-sell on default.

17. If the purchaser shall fail to comply with any or either of the foregoing conditions, his deposit money shall be forfeited to the vendors, who shall be at full liberty, without previously tendering a conveyance to the purchaser, to re-sell the property, either by public auction or private contract, and if on such re-sale there shall be any deficiency or loss to the vendors, the same and all expenses attending this present sale or such re-sale shall be recoverable by the vendors as and for liquidated damages.

V. Colliery as a going Concern.

Possession.

18. The property will be at the risk of the purchaser from the day of sale, but the purchaser will be entitled to immediate possession of the collieries, and to work the same upon signing the subjoined Memorandum No. 2.

MEMORANDUM No. 1.

Memorandum of contract.

Memorandum that ——— of ——— in the county of ——— has this day been declared the purchaser of the premises mentioned in the annexed particulars (subject to the annexed conditions), at the sum of ———, that he has paid into the hands of Messrs. ———, the auctioneers, the sum of ——— as a deposit and in part payment of the said purchase-money, and he hereby agrees to pay the remaining sum of ——— unto the vendors on the ——— day of ——— next, at the ——— Hotel, and the vendors, by the said Messrs. ——— as their agents, and the said purchaser hereby agree on their respective parts to fulfil the said conditions of sale.

Witness our hands this ——— day of ———, 18—.

(*Signatures of the purchaser and of the auctioneers.*)

Purchase-money	£	:	:
Deposit-money	£	:	:
Remaining unpaid . . .	£	:	:

Witness,

MEMORANDUM No. 2.

Memorandum of agreement as to possession without prejudice to right to raise objections, &c.

Memorandum that the above-named purchaser is hereby permitted to take immediate possession of the above mentioned collieries, hereditaments, plant, machinery, and premises (subject however to any existing tenancies of the surface hereditaments), without prejudice to any objections or requisitions he may consistently with the annexed conditions raise upon the title of the vendors: And to make such alterations in the machinery and working of the said collieries as he may think necessary or desirable for the purpose of more economically or efficiently working the same, and to get and sell coal therefrom. In consideration of which permission the said purchaser hereby attorns tenant to the vendors at the monthly rent of ———, and agrees to keep all the said collieries, hereditaments, plant, machinery and premises in proper repair and condition in all respects, and

Attornment by purchaser.

to carry on all mining operations therein and therewith in a proper and workmanlike manner, as the same are usually conducted in the Forest of Dean, and will not suffer any part thereof to become or remain drowned or flooded with water, or otherwise obstructed, except any workings, pits, or levels which have been or may be in a due and proper course of working abandoned: And will permit the vendors at all reasonable times to have access to and into and to inspect the same and the condition thereof, and for this purpose to have the use and assistance, free of charge, of all necessary machinery, plant, and workmen: And will not do or suffer anything to be done whereby a forfeiture of the said mines, or any of them, might be incurred. V. Colliery as a going Concern.

Dated this ——— day of ———, 18—.

Witness, (*Signature of purchaser.*)

VI. *CONDITIONS OF SALE under an* ORDER *of the* COURT.

1. No person is to advance less than £——— at each bidding, nor retract a bidding. Biddings.

2. The [*or* Each] sale is subject to a reserve price, which has been fixed by the judge to whose Court this action is attached, and the right is reserved to bid up to such price. Reserved price.

3. The [*or* Each] purchaser is, at the time of sale, to subscribe his name and address to his bidding in the bidding paper; and the abstract of title, and all written notices and communications and summonses are to be deemed to be duly delivered to and served upon the [*or* each] purchaser, by being left for him at such address unless or until he is represented by a solicitor. Signature of bidding paper by purchaser.

4. The [*or* Each] purchaser is, at the time of sale, to pay a deposit of ——— per cent. on the amount of his purchase-money to ———, the person appointed by the judge to receive the same. Deposit.

5. The chief clerk of the judge will, after the sale, proceed to certify the result, and ——— the ——— day of ———, 18—, at ——— o'clock at ———, is appointed as the time at which the purchaser [*or* purchasers] may, if he thinks [*or* they think] fit, attend by his [*or* their] solicitors at the chambers of the judge, at the Royal Courts of Justice, Strand, in the county of Middlesex, to settle such certificate. Date of settling certificate of result of sale.

VI. Court Conditions.

The certificate will then be settled, and will in due course be signed and filed, and become binding.

Delivery of abstract.

6. The vendor, the plaintiff in the action [*or describing him*], is, within eight days after such certificate has become binding, to deliver to the [*or* each] purchaser or his solicitor an abstract of the title to the property [*or* lot *or* lots purchased by him] subject to the stipulations contained in these conditions.

Requisitions, &c.

7. The [*or* Each] purchaser, whether his abstract be delivered within such eight days or not, shall within twenty-one days after the actual delivery of the abstract, deliver at the office of ———, solicitor, at ———, in the county of ———, a statement in writing of his objections and requisitions (if any) as to the title or evidence of title or the abstract, and subject thereto the title shall be deemed accepted, and all objections and requisitions not included in any statement sent within the time aforesaid shall be deemed to have been waived. Any answer to any objection or requisition shall be replied to in writing within ten days after the delivery thereof, and if not so replied to shall be taken to have been waived, and time shall be deemed in all respects as of the essence of this condition; and if the [*or* any] purchaser shall take any objection or make any requisition which the vendor is advised not to remove or comply with, the vendor, with the sanction of the judge, shall be at liberty, by notice in writing, to be delivered to the [*or* such] purchaser or his solicitor, and notwithstanding any intermediate negotiations, to rescind the contract for sale upon such terms as the judge shall approve, and the purchaser [whose contract is so rescinded] shall thereupon be entitled to receive back his deposit, and shall accept the same in discharge of all claims for costs or otherwise, and shall forthwith return all abstracts and papers in his possession.

Power with consent of judge to rescind.

Timber.

8. The [*or* Each] purchaser is, in addition to the amount of his bidding at the sale, to pay the value of all timber and timber-like trees, tellers, or pollards (if any) [on the lot *or* lots purchased by him *or* them] down to 1*s.* (one shilling) per stick inclusive, the amount thereof to be ascertained by a valuation to be made in manner following, that is to say, each party (vendor and purchaser) or their respective solicitors is [*or* are], within ——— days after the chief clerk's certificate has become binding, to appoint by writing one valuer, and to give notice in writing to the said party of

such appointment, and the valuers so appointed are to make such valuation; but before they commence their duty they are to appoint an umpire by writing, and the decision of such valuers, if they agree, or of such umpire, if they disagree, is to be final; and in case the [*or* any] purchaser shall neglect or refuse to appoint a valuer and give notice thereof in the manner and within the time above specified, the valuation is to be made by the valuer appointed by the vendor alone, and the valuation is to be final.

Payment of balance of purchase-money into Court.

9. The [*or* Each] purchaser is, under an order for that purpose to be obtained by him, or in case of his neglect by the vendor at the cost of the defaulting purchaser, upon application at the chambers of the judge, to pay the balance of his purchase-money (after deducting the amount paid as a deposit) together with the amount of the valuation (if any) into Court to the credit of this action [A. *v.* B.], 18—, A. 100, "The proceeds of the sale of the ———," on or before the ——— day of ———, 18—; and if from any cause whatever the same is not so paid, then the purchaser making default is to pay interest on the balance of his purchase-money, including the amount of such valuation, at the rate of ——— per cent. per annum from the said ——— day of ———, 18—, to the day on which the same is actually paid, deducting property tax. Upon payment of the balance of his purchase-money in manner aforesaid, the [*or* each] purchaser is to be entitled to possession, or to the rents and profits of the property [*or* of the lot or lots purchased by him], as from the said ——— day of ———, 18—, from which day all outgoings are to be paid by the purchaser, and such rents, profits and outgoings shall, if necessary, be apportioned by the judge.

Compensation to be settled by judge in chambers.

10. If any error or misstatement shall appear to have been made in the above particulars, such error or misstatement is not to annul the sale, or entitle the [*or* any] purchaser to be discharged from his purchase, but (except as to quantity, which shall be deemed correct and not a subject for compensation if incorrect) a compensation is to be made to or by the purchaser, as the case may be, and the amount of such compensation is to be settled by the judge at chambers.

Resale on default.

Lastly, if the [*or* any] purchaser shall not pay his purchase-money at the time above specified, or at any other time which may be named in any order for that purpose, and in all other respects perform these conditions, his deposit-money

VI. Court Conditions.

shall be forfeited to the vendor, and an order may be made by the judge, upon application at chambers, for the resale of the property [*or* of the lot *or* lots], and for payment by the purchaser of the deficiency (if any) in the price which may be obtained upon such resale, and of all costs and expenses occasioned by such default, after giving credit for the deposit.

VII. *CONDITIONS OF SALE of* Shares *and* Mortgage Debentures.

Biddings.

1. The highest bidder for each lot shall be the purchaser thereof, the vendor reserving the right to bid. No bidding shall be retracted, and if a dispute shall arise as to any bidding the lot in dispute shall be put up again.

Deposit and completion.

2. The purchaser of each lot shall, at the close of the sale to him, pay to the auctioneers a deposit of 20 per cent. upon and in part payment of the purchase-money, and furnish his full name and address and (as regards the shares in the ——— Life Assurance Society) his qualification to hold shares to the auctioneers, and also sign the contract hereto subjoined, and shall pay the remainder of the purchase-money on the ——— day of ———, 18—, at the office of Messrs. ———, the vendor's solicitors, situate at ———, in the county of ———, at which time and place the purchases shall be completed. If from any cause whatever, other than the vendor's wilful neglect or default, any purchase shall not be completed on the before-mentioned day, the purchaser shall pay interest on his unpaid purchase-money, after the rate of 5 per cent. per annum, from that day until the completion of his purchase, subject and without prejudice to the rights reserved to the vendor by the last of these conditions.

Interest.

Arrangement for transfers.

3. The vendor will, within seven days after the close of the sale, forward the statement of the name and address, and (where necessary) qualification to hold shares, of the respective purchasers to the secretaries of the respective companies, with a request that a transfer may be prepared. Upon payment of the residue of the purchase-money the vendor will execute transfers of the shares and of the debentures to the respective purchasers.

VII. Shares and Mortgage Debentures.

4. All inquiries (if any) as to the vendor's title are to be made by and at the expense of the purchasers requiring the same, and all other things to be done, or expenses to be incurred in or about the verification of the vendor's title, or the transfer and registration of the shares and debentures into the names of the respective purchasers, are to be at their expense. If any purchaser of shares shall not be accepted by the board of directors of the company before the said ——— day of ———, 18—, or if the purchaser shall, at any period prior to completion of the purchase, make any objection or requisition as to title or otherwise, which the vendor shall be unable or unwilling to comply with on any ground, and notwithstanding any intermediate negotiation, the vendor may, by notice in writing to the purchaser, rescind the contract for sale. In such case the vendor will, within one week after such notice, repay to the purchaser his deposit-money, which is to be accepted by him in satisfaction of all claims on any account whatever, and without payment of interest or costs.

Inquiries as to title of vendor.

Power to rescind.

5. If any error or misstatement shall be discovered in these particulars the same shall not annul the sale, but an allowance or compensation shall be made by or to the vendor, as the case may be, the amount, in case of dispute, to be settled by arbitration in the usual way.

Compensation.

6. If any purchaser shall fail to comply with any of these conditions, and to complete his purchase agreeably thereto, the deposit-money of the defaulting purchaser shall be absolutely forfeited to the vendor, who shall be at liberty to resell the lot without notice or tender of a transfer or assignment, and any deficiency in price, with the attendant costs, shall be paid by such purchaser and recoverable from him as liquidated damages.

Power of resale on default.

MEMORANDUM OF CONTRACT (*ante*, p. 748).

VIII. *CONDITIONS OF SALE of* Furniture *or other* Goods.

Conduct of sale.

1. The highest bidder shall be the purchaser, and if any dispute shall arise respecting any bidding, the lot shall be put up again, or not, at the auctioneer's discretion, to whom is reserved the right of refusing any bidding and of withdrawing any lots from the sale.

Biddings.

2. No person shall advance at any bidding up to 1*l.* less than one shilling; nor at any bidding from 1*l.* up to 2*l.* less than two shillings; and so on in proportion.

Deposit, &c.

3. The purchaser of each lot shall, if required, pay down immediately a deposit of 25 per cent. in part payment of his purchase-money, and shall give his or her name and address; such deposit shall be applicable, at the auctioneer's discretion, in or towards payment for any of the lots bought by such purchaser.

Completion. Compensation.

4. The lots shall be paid for before four o'clock the day after the sale, whether genuine and authentic or not, with all faults and errors of description, and cleared and removed at the purchaser's expense and risk, the auctioneer not being responsible for the correct description, genuineness, or authenticity of, or for any fault or defect in any lot, and making no warranty whatever.

5. On failure of any purchaser to comply with the above conditions, the money deposited by him in part payment as aforesaid shall be forfeited; and all lots not cleared as aforesaid shall, without notice, be resold by public or private sale, and the deficiency (if any), as well as the expenses of such resale, shall be made good by the defaulters at this present sale.

IX. *CONDITIONS OF SALE of a set of* CHAMBERS *by* TENDER.

1. Persons desirous of competing for the purchase of the vendor's estate and interest in the chambers, shall subscribe their names and addresses to tenders, and forward the same, under seal, to the office of the vendor's solicitor, No. ——— on or before the ——— day of ———, 18—. The tender to be in the form endorsed on the conditions and particulars of sale. Date for delivery of tenders.

2. The vendor shall have the unqualified right of selecting any tender, or rejecting any tender, and if any tender shall be accepted, the vendor shall give notice of his acceptance by letter, transmitted by post, to the person making the accepted tender, according to the address given in the same, within eight days from the said ——— day of ———, 18—. Acceptance of tender.

3. Within two days after the receipt of the said notice, the purchaser shall pay to the vendor's solicitor, as stakeholder, a deposit of ——— per cent. on the amount, and in part of his purchase-money, and sign the subjoined agreement. Deposit.

4. The conveyance of the property purchased shall be prepared by and at the expense of the purchaser. Conveyance.

5. The remainder of the purchase-money shall be paid to the vendor's solicitor, at his said office, on the ——— day of ———, 18—, at which time the conveyance shall be delivered and the purchase completed. Completion.

6. The title shall commence with an indenture of conveyance by way of sale, dated the ——— day of ———, 18—. Commencement of title.

7. The purchaser shall admit the identity of the property purchased with that comprised in the muniments offered by the vendor, as the title to such property, upon a declaration to be furnished (if required) at the purchaser's expense, that the purchased property has been possessed for the last thirty years under the said title. Identity.

8. The purchaser shall deliver in writing any objections or requisitions he may desire to make in respect of the title or otherwise within ten days from the day of the delivery of the abstract, and in default of such objections and requisitions (if none), and subject to such (if any), shall be deemed to have accepted the title. If any objection or requisition Requisitions and rescission.

IX. Sale of Chambers by Tender.

whatsoever shall be made by the purchaser as to the title or otherwise which the vendor shall be unable or unwilling to comply with, then the vendor shall have full power at any time, by notice in writing to be given to the purchaser or his solicitor, to annul the sale, and shall thereupon return to the purchaser his deposit in full satisfaction of all his claims, and without payment of interest, costs, or other compensation whatever, and the purchaser shall thereupon return to the vendor all papers which may have been delivered to him by the vendor.

Compensation.

9. The chambers are believed to be, and shall be taken to be, correctly described as to quantity and otherwise, and are sold subject to all easements (if any) subsisting thereon, and if any error, or misstatement, or omission in the above particulars shall be discovered, the same shall not annul the sale, and no compensation is to be made or allowed to the purchaser in respect thereof.

Power of re-sale.

10. If the purchaser shall not pay the balance of his purchase-money at the time specified, and in all other respects perform these conditions, the said deposit shall be forfeited; and it shall be in the option of the vendor to annul the sale and to resell the property, either by tender or by public auction or private contract [*continue ut ante*, p. 743].

Form of Tender.

Form of tender.

To Mr. [*vendor*].

I hereby offer to purchase the set of chambers described in the annexed particulars, subject to the above-written conditions of sale, at the price of £———, and agree to pay the said purchase-money in accordance with the said conditions, and in all other respects to observe and perform the stipulations therein contained and on the part of the purchaser to be observed and performed.

Signature in full ———.

Residence ———.

Date ———.

X. *CONDITIONS for* LETTING *Building Land by* TENDER.

CONDITIONS for letting a plot of ground, being the site of No. ———, ——— Street, in the City of London, and known as the "———" Tavern, and of a house adjoining the same at the rear, and situate in ——— Court, shown on the plan annexed hereto and thereon coloured pink. Particulars.

1. The intending lessee shall carefully pull down and remove, at his own expense, the messuages, tenements and buildings at present erected and standing on the aforesaid plot of ground. Existing buildings to be removed.

2. The intending lessee shall, at his own expense, before commencing such pulling down, shore up all adjoining premises and take all risk of damage of every description that may accrue thereto, and construct and maintain a good and sufficient hoarding in front of the said plot of ground during the said pulling down and removal and erection of the proposed buildings, and construct and maintain such a temporary footway with post and rail fencing for the protection of the public as may be required by the authorities, and give all proper and necessary notices to adjoining owners, the parish authorities, the Metropolitan Board of Works and others, and to pay to them or any of them all such necessary and proper fees as may be rightfully demanded. Operations preliminary to building.

3. The intending lessee shall, in accordance with the provisions of the Metropolitan Building Acts, and the Metropolis Local Management Acts, and all such other building or improvement Acts as may for the time being be in force in the city of London, erect at his own expense upon the said plot of ground a good and substantial brick and stone messuage and tenement, and other buildings of such a nature and description as may best be used for the purpose of a public-house, tavern, or restaurant, such buildings to cover the whole of the said plot of ground, and to be in accordance with elevations and plans to be submitted to the intending lessor, and to be approved of by his architect, Mr. [*architect*], or other his architect for the time being, and shall pay all fees demanded by the said [*architect*], or other architect as aforesaid, for such examina- Lessee to build on site.

X. Letting Building Land by Tender.

tion and approval of the said plans and elevations, and for his inspection of the works during their progress, and also shall pay all the expenses of constructing such sewers and drains to the said messuage and premises as may be required by the vestry of the parish, or the board of works for the district. The intending lessee shall, during construction, effect such insurances against fire in such office and for such respective amounts as the said [*architect*] or other architect shall direct.

Amount to be expended by intending lessee.

4. The sum of 5,000*l.* at the least is to be expended by the intending lessee upon the construction of the messuage, tenement, and other buildings, and the same shall be erected and covered in within nine calendar months, from the ——— day of ———, 18—, and completed within three calendar months after such covering in. In case of default in the performance of any of the conditions contained in this clause,

Power of re-entry on default.

the intending lessor may enter upon and keep possession of the premises and all improvements, without making any compensation for the same, and may refuse to execute a lease in accordance with these conditions.

Possession: stock in trade, fixtures, &c.

5. The intending lessee shall take possession of the said premises on the ———day of ———, 18—, and shall take the stock and the trade fixtures and fittings of the present tenant of the premises at a valuation, the amount of which shall be determined by two valuers or their umpire in the usual way, and shall be paid by the intending lessee to the present tenant, on or before the ———day of ———, 18—; and the intending lessee shall make all proper and necessary arrangements for carrying on the business of a licensed victualler, and the sale of beer, spirits, and wine, during the pulling down and rebuilding of the said premises, and shall do whatever is necessary to keep the licence in full operation, and shall not allow anything to be done or omitted to be done which shall in anywise prejudice the licence.

Preparation of lease.

6. The lease and counterpart shall be prepared by the solicitor for the intending lessor, and shall be executed respectively by him and the intending lessee within fourteen days after the said buildings shall be completed to the satisfaction of the said [*architect*], or such other architect as aforesaid.

Terms of the proposed lease.

7. The term of lease will be ——— years from the ———

X. Letting Building Land by Tender.

day of ———, 18—, from which date the accepted rent will be payable on the usual quarter days, both before and after the execution of the lease. No premium will be payable by the intending lessee for the lease, as the intending lessor has no power to accept any premium; but the intending lessee shall, within three days after his tender shall be accepted, pay to the solicitor of the intending lessee the sum of £——— to cover the fees of the said [*architect*] up to the date of such acceptance, and the legal and other costs, charges and expenses relating to the matter, which sum shall include the expenses of the preparation and completion of the said lease and counterpart.

Outgoings to be borne by intending lessee.

8. The intending lessee shall pay the land tax, tithes, and all other taxes and rates, assessments and outgoings of every description for the time being payable either by landlord or tenant in respect of or charged upon the premises, except the landlord's property tax.

Covenants to be contained in proposed lease.

9. The lease shall contain all such covenants and conditions as are contained in, and shall be in the form of a copy of the proposed lease, which may be seen at the office of Messrs. ———, at No. —, Lincoln's Inn Fields, W.C., between the hours of ——— a.m. and ——— o'clock p.m. on working days, and a copy of such proposed lease shall be annexed to the tender which shall be accepted.

Signature of contract and lease.

10. The persons whose tender may be accepted shall immediately upon such acceptance execute a contract in the terms of these conditions, and sign the said form of lease.

Delivery of tender.

11. The tender at the foot hereof shall be signed, and the names, addresses and descriptions of two references inserted by the party tendering, sealed up and addressed Messrs. ———, No. —, Lincoln's Inn Fields, London, W.C., and shall be delivered at No. —, Lincoln's Inn Fields aforesaid, before ——— o'clock p.m. on ———, the ——— day of ———, 18—. No tender will be received that is not made on the printed form.

Acceptance of tender.

12. The intending lessor does not bind himself to accept the highest or any tender which may be delivered.

Title of lessor.

13. The intending lessor will accept the tender and grant the lease in pursuance of the power given to him as beneficial tenant for life of the premises by "The Settled Land Act, 1882," and no requisition shall be made as to his power to enter into any contract for or to grant such a lease.

X. Letting Building Land by Tender.

FORM OF TENDER.

To Mr. [*intending lessor*].

I hereby offer to take a lease of the above-mentioned plot of ground for the term of years, and subject to the covenants and conditions above mentioned or referred to, at the clear yearly rent of £———, and agree to pay the said sum of £——— for such fees, costs, charges, and expenses as above-mentioned, and to fulfil in all respects the above conditions, so far as they are on the contractor's part to be fulfilled.

Signature in full ———.

Residence ———.

Date ———.

[*Names, addresses, and descriptions of two references.*]

XI. *CONDITIONS OF SALE of Timber.*

Conduct of sale.

1. The highest bidder (in due time) shall be the purchaser, and in case of any dispute, the lot shall be put up again at the last undisputed bidding.

Deposit and completion.

2. Each purchaser is to declare his name and residence, and, if required, shall pay a deposit of 10 per cent. on the purchase-money of the lot purchased by him; the remainder of, or all the purchase-money, with one shilling per lot for lot-money, shall be paid to the brokers at the time an order for delivery is given.

Mode of payment of purchase-money.

3. Each lot is to be paid for to the brokers on or before the prompt of fourteen days, either in money, deducting six months' discount at the rate of 5 per cent. per annum (or the Bank of England rate on the day of sale, if above 5 per cent. per annum), or by such acceptances as the vendors may approve of, due at or within six months from the day of sale.

Error in dimensions and description.

4. The several lots are to be received as and where they lie, at the purchaser's expense, with all faults and defects, and without any allowance for error in description—the timber and logs according to the razed contents, and other goods as

they may rise from the piles—the dimensions when given being according to the dock returns, and the quality when given according to the shippers' assortment or designation, unless otherwise specially described. Any rent incurred after four weeks is to be paid by the purchasers of the respective lots. Rent.

5. When the sale shall extend over more than one day, the prompt will be reckoned, the bills drawn, and the rent allowed from the second day, with the exception of mahogany and cabinet woods, for which the invoices and delivery orders will date from the day of sale. Date from which prompt, &c. reckoned.

6. Fourteen days from the date of the issue of the delivery order will be allowed for rent and cash payment on any lot that may not be ready for delivery on or within the prompt. Time for payment where lots not ready for delivery.

7. In default of compliance with the above conditions, the deposit money, if any, received shall be forfeited to the owners of the goods, who shall be at liberty to resell the lot or lots in respect of which such default shall have occurred, either by public auction or private contract, and the purchaser or purchasers of such lot or lots shall be liable for all loss and charges attendant upon such re-sale. Power of re-sale.

8. All goods sold at this sale to be at the risk of the sellers in respect of fire, provided such goods have not been removed from the docks, for thirty days from the date of the second day's sale. In the event of non-delivery by loss from fire, the contract for such portion to be void and the deposit, if any, paid to be returned. Risk as to loss by fire.

SPECIAL CONDITIONS OF SALE.

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I. Biddings and Mode of Sale.

First bidding.

1. Each lot shall be put up at a sum to be fixed by the auctioneer at the time of sale.

Advances in bidding.

2. No person shall advance a less sum at each bidding than shall be named by the auctioneer at the time of putting up each lot, or retract any bidding.

3. No person shall advance less than £——— at any bidding, or retract any bidding.

4. No person shall advance less than 20*l.* at any bidding, on lots —, —; 10*l.* on lots —, —; 5*l.* on lots —, —, —; and 2*l.* on each of the other lots; or retract any bidding.

Disputes.

5. The highest bidder shall be the purchaser; and if any dispute arise respecting any bidding, the property [*or* lot] shall be put up again at the last undisputed bidding, or the auctioneer may determine the dispute.

Mode of selling to be fixed at the time of sale.

6. The estate will be first offered in one lot, and if not so sold, then in the lots mentioned in the particulars, or in such other lots as may be determined on at the time of sale, and subject to such conditions as may be then produced. The auctioneer shall declare the mode of bidding immediately before the sale. The vendor, his solicitor or agent, shall be allowed to bid once, and the highest bidder shall be the purchaser; no bidding shall be retracted; and if any dispute arise respecting any bidding, the lot shall be put up again at the last undisputed bidding.

I. Biddings and Mode of Sale.

7. One bidding will be reserved for each lot.

8. One person will bid at the sale on behalf of the vendor.

Reserved bidding (*a*).

9. The property is offered for sale subject to a reserve price; the vendor reserves the right of bidding himself or by his agents, as often as he or they shall think proper.

Sale without reserve.

10. The property is offered for sale without reserve.

Right to rearrange and withdraw lots, and to refuse biddings.

11. The vendor reserves to himself the right to consolidate two or more lots into one lot, and to divide any lot into separate lots.

12. The vendors reserve the right either before or at the auction to put any two or more lots together, or to subdivide any lot or lots, and also to vary the arrangement of the lots, or any of them, and also to withdraw from the sale any lot or lots, without declaring the reserve price, and to refuse any bidding. No representation at or before the time of sale shall be binding on the vendors unless reduced into writing, and any addition to these conditions or to the particulars, or any alteration therein, if made in writing, but not otherwise, shall be obligatory as conditions of sale.

Right to make alterations in sale plan.

13. The vendor reserves the right, in case any of the lots shall be withdrawn, or shall remain unsold at the present sale, to make any alterations he shall think advisable in the intended arrangements for laying out the property offered for sale, and for making roads and other works thereon, indicated by the sale plan annexed to the particulars.

II. Deposit—Expenses of Sale—Completion—Delivery of Possession and Payment of Outgoings.

Condition as to deposit, &c. on sale of hotel as going concern.

1. The purchaser shall at the close of the sale to him, pay down to the auctioneer a deposit of 10 per cent. on the amount of his purchase-money, and sign an agreement in the form subjoined to these conditions for the completion of his purchase according to these conditions, and shall pay the remainder of his purchase-money and the amount of the valuation of furniture, trade fittings, and stock, to be made as mentioned in the particulars, on the 29th day of September next. The deposit and the remainder of the purchase-money shall, on the said 29th day of September next, be paid by the auctioneer and the purchaser respectively to Messrs. ———

(*a*) As to sales subject to reserve prices, see the Sales by Auction Act, 1867 (30 & 31 Vict. c. 48), and *Gilliat* v. *Gilliat*, L. R., 9 Eq. 60. See also *ante*, p. 641, for a discussion of this matter.

II. Deposit, Completion, &c.

& Co., of ———, bankers, to an account there in the names of [A. B.] and [C. D.], and the amount of the said valuation shall on the same day be paid to the trustees of Messrs. [E. F.] and [G. H.] (bankrupts), at the office, No. —, ——— Street, ———, in the county of ———, of Messrs. ——— & Co., the solicitors of the vendors, at which time and place the purchase shall be completed; and the purchaser paying the remainder of his purchase-money and the amount of valuation in manner aforesaid, shall as from that day be let into possession of the property (subject to the interests of the ——— Society and the ——— Club respectively mentioned in the particulars) and of the business of the hotel as a going concern, and bear all rents, rates, taxes, and outgoings in respect of the property, and discharge all wages and other outgoings connected with the said business, and up to that day all rents, rates, taxes, and outgoings in respect of the said property, and all wages and outgoings connected with the said business, shall be discharged by the vendors or others now interested in the premises, and all such rents, rates, taxes, and outgoings, and all such wages and other outgoings connected with the said business shall (if necessary) be apportioned, and if from any cause whatever, other than wilful default on the part of the vendors, the completion of the purchase shall be delayed beyond the before-mentioned day, the remainder of the purchase-money and the amount of the said valuation shall bear interest at the rate of 5 per cent. per annum from that day to the day of payment, and if for any reason possession is not delivered to the purchaser on the day aforesaid, the business on and from that day shall be carried on at the risk and cost, but for the benefit of the purchaser, until possession is delivered to him, and any question which may arise as to the balance due to or from the purchaser in respect of the business, and any other questions which may arise in reference to the carrying on of the same shall be settled or decided by the arbitration of two referees, one to be appointed by the vendors and the other by the purchaser, or by an umpire to be appointed by the two referees before they proceed in the reference, and the decision of the referees, if they agree, or of the umpire, if they disagree, shall be conclusive.

Condition as to deposit, &c. on sale of manors and

2. Each purchaser shall, at the close of the sale to him, pay down a deposit of 10 per cent. on the amount of his purchase-money, and sign an agreement in the form sub-

joined to these conditions for the completion of his purchase according to these conditions, and shall pay the remainder of his purchase-money and the amount of the valuation, as hereinafter provided, on the 10th day of March next, at the office, No. —, Lincoln's Inn Fields, in the county of Middlesex, of Messrs ——— & Co., the solicitors of the vendor, at which time and place the purchases are to be completed; and a purchaser paying his purchase-money is as from that day to be let into possession or receipt of rents and profits, and up to that day all rent, quit rents, rates, taxes, and outgoings are to be apportioned and allowed. Where the right or title to admission to copyhold lands has accrued before the said 10th of March, the fines payable in respect of such admission shall belong to the vendor, though the same may not be paid or payable until the holding of a Court at a date later than the said 10th of March: and the purchaser on becoming lord of the several manors shall be bound not to compound or release such fines. And if from any cause whatever, other than wilful default on the part of the vendor, the completion of any purchase is delayed beyond the beforementioned day, the remainder of the purchase-money and the amount of the said valuation is to bear interest at the rate of 5 per cent. per annum from that day to the day of actual payment thereof.

large estates in lots.

3. The vendor shall, if any purchaser shall within ——— days after payment of his deposit so require in writing, place the same, at the risk of such purchaser, with Messrs. ——— & Co., bankers, on deposit in the joint names of the vendor and purchaser until the completion or abandonment of the purchase in respect of which it is payable, and the interest (if any) shall follow the destination of the deposit.

Deposit to be paid into a bank until completion or abandonment (*b*).

4. The vendor shall, within ——— days after payment of each deposit, invest the same in the purchase of Exchequer bills, which will be replaced, if and when paid off, by other like bills. All such Exchequer bills shall be deposited at the bank of Messrs. ——— & Co. until the completion or abandonment of the purchase, and the interest (if any) shall follow the destination of the deposit.

Deposit to be invested in Exchequer bills (*b*).

5. If from any cause whatever, other than the wilful

Payment of interest at

(*b*) These conditions are very unusual, and will only be used in cases where the property sold is expected to realize a very considerable price, the object being to protect the vendor from loss of interest.

II. Deposit, Completion, &c.

default of the vendor, the completion shall be delayed beyond the ——— day of ——— aforesaid [*the day fixed for completion*], the purchaser shall pay interest at the rate of 4 per cent. per annum on the remainder of the purchase-money, from that date until actual payment thereof, or until the 1st day of January, 18—. And from and after such last-mentioned date, if the remainder of the purchase-money shall be then unpaid, the purchaser shall pay interest thereon at the rate of 5 per cent. per annum until actual payment of the same; but this provision shall not be taken to create any right on the part of the purchaser to withhold or delay the payment of the remainder of the purchase-money, or any part thereof, upon paying such higher rate of interest.

increasing rates (*c*).

Completion; purchaser to discharge claims of outgoing tenants.

6. The remainder of the purchase-money of each lot shall be paid on the 4th day of April next, at the office of Messrs. ———, No. —, ——— Buildings, Lincoln's Inn, the vendor's solicitors, at which time and place the purchases shall be completed; and if from any cause whatever the purchase of either lot shall not be completed on that day, the purchaser thereof shall pay to the vendor interest after the rate of 5 per cent. per annum on the remainder of his purchase-money from that day until the completion of the purchase. The purchaser of each lot shall be entitled to the possession of the lot purchased by him from the said 4th day of April next, and shall at his own expense ascertain, pay, and discharge all moneys and payments to which the tenants under the now existing tenancy of the property will become entitled in respect of such lot as outgoing tenants, on the expiration of their tenancy, all other outgoings up to the said 4th day of April being cleared by the vendor, and such other outgoings shall for the purpose of this condition be apportioned.

Purchaser to pay expenses of sale.

7. The purchaser shall, immediately after the sale, pay to the vendor's solicitors, for preparing the contract and conditions, and for a duplicate thereof, the following fees, viz.: the sum of 1*l.* for every 100*l.* up to the sum of 1,500*l.*, and the sum of 10*s.* for every 100*l.* and fractional part of 100*l.* above 1,500*l.*, and shall also pay at the same time to the auctioneer the like fees for his commission for selling the property.

(*c*) See *Herbert* v. *Salisbury and Yeovil Rail. Co.*, L. R., 2 Eq. 221; and *ante*, p. 654.

II. Deposit, Completion, &c.

Delivery of possession to purchaser before completion (*d*).

8. The vendors will permit the purchaser of the property, without prejudice to any question on the title, to take possession of such portion of the property as may be unoccupied, for the purpose of cultivating it in a proper and husbandlike manner, upon the balance of the purchase-money being deposited in Messrs. ——— & Co.'s Bank in the joint names of the vendors and the purchaser, to await the completion of the purchase, or the vendors will, at the request and expense of the purchaser, do such things as may be necessary for the due cultivation of the land. But in default of such entry or request the vendors shall not be bound to see to the management or cultivation of the property.

III. Delivery of Abstract.

Original deeds may be delivered in lieu of abstract.

1. As the vendor's title deeds consist only of the original lease and an assignment indorsed thereon, he shall be at liberty (but shall not be bound) to deliver the original deeds to the purchaser in lieu of any abstract or copies thereof (*e*).

Small purchasers not entitled to delivery of abstract.

2. No purchaser whose purchase-money does not exceed 300*l.* shall, except upon the terms hereinafter mentioned, be entitled to delivery of an abstract of title, but an abstract prepared according to these conditions will, during fourteen days after the sale, be deposited at the office of Messrs. ——— & Co., No. —, Lincoln's Inn Fields aforesaid during business hours, and the same may be examined, and extracts may be taken therefrom by intending purchasers or their solicitors; Provided that any such purchaser as aforesaid, on giving notice in writing to Messrs. ——— & Co., requesting that an abstract may be delivered to him, and also on paying to them the cost of such abstract within four days after the sale, shall

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(*d*) This may easily be adapted to the sale of business premises. As to entry before completion see *ante*, Vol. I. p. 431, note (*e*).

Purchaser entitled to an abstract.

(*e*) Lord *St. Leonards* says that a purchaser may insist upon an abstract, and is not bound to wade through the deeds: Sugd. Vend. 406. Where the conditions of sale of a leasehold estate provided that an abstract of the vendor's title should be delivered to the purchaser at the vendor's expense, and the vendor was not to show the lessor's title, it was held, in an action of assumpsit against the purchaser for not completing his contract, that an allegation in the declaration that the vendor had delivered an abstract of title pursuant to the condition, was not sustained by proof that he had delivered the original lease and assignment, which constituted his only documents of title: *Horne* v. *Wingfield*, 3 Sc. N. R. 340. See also *Price* v. *Dyer*, 17 Ves. 356; *Robinson* v. *Page*, 3 Russ. 114; *ante*, Vol. I. p. 63 *et seq.*, and *ante*, p. 654.

III. Delivery of Abstract.

be entitled to have delivered to him an abstract prepared in accordance with these conditions. Every purchaser, whether he so attend or not, shall be deemed to be bound by these conditions. In case no abstract is required he shall be bound in the same way as if an abstract prepared according to these conditions had been actually delivered to him.

Mode of delivering abstract on sale by Court.

3. Each purchaser shall, at the time of sale, subscribe his name and address to his bidding, and the abstract of title and all written notices and communications and summonses shall be deemed to have been duly delivered to and served upon him if the same shall have been left for him at such address, unless or until he is represented by a solicitor.

Abstract to contain maps, &c.

4. The [Each] abstract will contain copies of, or sufficient extracts from, all maps or plans of or relating to the property [respective lots] offered for sale, drawn upon any of the abstracted documents.

Vendor to endeavour to obtain lessor's licence to assign.

5. The lease contains a restriction on assignment without licence, which is not to be unreasonably withheld in the case of a respectable and responsible tenant. The vendors will, immediately after the sale, apply for and endeavour to obtain the necessary licence, but if unable to obtain it within three weeks from the day of sale, shall be entitled to rescind the contract for sale, and thereupon the purchaser shall receive back his deposit and make no claim for costs or otherwise.

Deposit of abstract of lease for perusal prior to sale.

An abstract or copy of the lease may be inspected at the auctioneer's offices for fourteen days prior to the day of sale, and in the sale room on the day of sale, and the purchaser shall be deemed to have notice of all the contents thereof.

IV. Commencement of Title.

General form.

1. The abstract of title shall commence with an indenture dated the ——— day of ———, 18—, being a conveyance by way of sale [*or* a mortgage, *or* the lease, *or* the under-lease], under which the vendor holds the property (*a*).

Admission to copyholds.

2. The abstract of title shall commence, as to part of the property, with an admission of [A. B.], dated the ——— day of ———, 18—, and as to the remainder of the property with an admission of the said [A. B.], dated the ——— day of ———, 18—. The earlier admissions to the property, dated as far back as the year ———, will be delivered to the pur-

(*a*) As to the necessity for accurate description of the deed forming the commencement of the title, see *ante*, p. 666.

IV. Commencement of Title.

chaser on completion of the purchase, but no requisition or objection shall be made in respect of them, and every recital or statement contained in any instrument dated fifteen years or upwards, prior to the day of sale, shall be accepted as conclusive evidence of the matter or fact recited or stated (*b*).

Admission and enfranchisement (*c*).

3. The property offered for sale was formerly copyhold of the manor of ———. The abstract of the copyhold title shall commence with an admission of [A. B.], dated the ——— day of ———, 18—, and the abstract of the freehold title shall commence with a deed of enfranchisement dated the ——— day of ———, 18—.

Allotment under an inclosure award.

4. The title to the allotments numbered ——— and ——— on the sale plan, shall commence with an award under the Act of Parliament for the inclosure of ———; the validity of the award shall not be called in question, nor shall the title to the hereditaments in respect of which it was made be called for or investigated, nor shall any requisition or objection be made or taken in respect thereof; and it shall be assumed that by the award the fee simple became vested in the allottee named in the award, subject only to the reservations and matters therein mentioned.

Allotment.

5. The title to the property (save small parts after mentioned, and leases or licences) shall commence with the award in 18— of the ——— Commissioners, which shall be considered and taken as correct and sufficient in all respects, without reference to, or objections concerning any Acts of Parliament, or other matters therein mentioned or referred to, or relating to the premises, and shall be considered to have conferred a fee simple or other like descendible estate on the person found entitled by such award, except as therein otherwise expressly stated, subject to the rents, renders, rules and regulations therein reserved and contained (the subsequent alterations in which shall also be considered good and sufficient) with respect to such property, without the production of or necessity for any gales or grants in pursuance of or as recognised by or mentioned in such award, whether previous or subsequent thereto, and without the production of any previous title in the persons so found entitled whether in the

(*b*) See also, as to recitals being evidence, *post*, p. 803.

(*c*) The purchaser is not entitled to require production of the title to make the enfranchisement. See Conveyancing and Law of Property Act, 1881, sect. 3, sub-sect. (2), *ante*, pp. 634, 671.

IV. Commencement of Title.

vendors' possession or power or not, and whether subsequently referred to or covenanted to be produced or not, or any then existing or antecedent incumbrances which, if not appearing in the subsequent title and shown to have been satisfied, shall be considered to have been satisfied, and the estate or interest thereby affected got in, and particularly with respect to any term of years existing in the property or any part thereof which shall not now be got in or further dealt with, whether actually attending the inheritance or not, and any claim, estate or interest mentioned in the award and not subsequently dealt with in the title shall be considered at an end, or not really to have existed.

Allotment.

6. The purchaser shall assume the validity and regularity in all respects of an inclosure award, dated the ——— day of ———, 18—, by which the property was allotted to [A. B.], who was the lord of the manor of ———, and shall also assume that the said [A. B.] had then no common rights other than those which belonged to him as lord of the said manor.

Allotment.

7. The title to lot 1 shall commence with an extract from the ——— inclosure award, dated the ———, 18—, and confirmed the ———, 18—, by which award four small allotments of land in ——— aforesaid were made to the trustees of [C. G.]. The purchaser of lot 1 shall not require any abstract or copy of the Act under which the said inclosure award was made, or any other evidence of the identity of the trustees than the statement hereinafter made, and shall not make any objection or requisition on the ground that the said trustees were not at the date of the said award or of the confirmation thereof seised of the legal estate in the hereditaments in respect of which the said allotments were made to them as aforesaid, but shall assume that by virtue of the said award the land comprised in the said allotments became legally vested in [E. H.] and [R. G.], who were then the surviving trustees of a settlement dated the ———, 18—, and made upon the marriage of the said [A. G.] with her second husband, the said [C. G.], and who were the persons intended to be designated by the description, "The Trustees of [C. G]."

Conveyance to charitable uses.

8. The title shall commence with an indenture, dated the ——— day of ———, 18—, purporting to be a conveyance on a sale to certain persons who by deed dated the ——— day of ———, 18—, afterwards inrolled under statute

IV. Commencement of Title.

Evidence of rights of third parties.

25 & 26 Vict. c. 17 (the enrolment whereof shall be considered as sufficient), declared that they held in trust for an association called the ——— Society. The said indenture of the ——— day of ———, 18—, included the premises, No. —, ——— Street, and is made subject to certain liberties and privileges referred to in the latter deed as specified in certain deeds of 19th and 20th May, 17—. Such liberties and privileges are believed to relate to the enjoyment by the owners and occupiers of No. —, ——— Street, of certain rights under the entrance to No. —, ——— Street, and also rights of drainage, but the vendors shall not be required to specify or furnish any evidence of the nature of such liberties and privileges, and no objection shall be made in respect thereof.

Conveyance under order of Court.

9. The title to the hereditaments comprised in lot 2 shall commence with an indenture dated the ——— day of ———, 18—. The said indenture was executed for carrying out sales made under the direction of the Court of Chancery, and the titles to the property comprised in such indenture are by recitals carried back for several years. The vendors will produce such documents as are in their possession, in verification of such recitals, and the purchaser of lot 2 may, if he thinks fit, at his own expense, have (but shall not otherwise be entitled to) abstracts of such documents, but shall not make any objection to or requisition on any such abstract, if so required.

Conveyance under order of Court.

10. As to lot 3, the title shall commence with an indenture of the ——— day of ———, 18—, being the purchase by the trustees of the settlement of the late General and Mrs. ———, and as this property was purchased by the vendor, under an order of the Chancery Division, made in an action of ——— *v.* ———, 18—, No. —, for carrying into execution the trusts of the said settlement, the purchaser shall be satisfied with the production of a print of the statement of claim in the action in which the order was made, which states that settlement, and shows the interests of the beneficiaries thereunder, and shall not make any objection or requisition in respect of the settlement, or the action aforesaid, or the said order for sale, and shall assume, without objection or requisition of any kind, the correctness of the statement of claim, and the facts and deeds therein stated, and that all proper parties were before the Court when the

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order was made, and that the same was binding on all the beneficiaries under the settlement.

Corporation property.

11. The whole property formerly belonged to the mayor, aldermen, and burgesses of the borough of ———, and the titles to the different portions of the property shall commence with the following conveyances or leases from that corporation, viz.:—As to the messuage and stables, and some adjoining ground, with a conveyance dated the ——— day of ———, 18—, as to other portions of the property with leases dated respectively the ——— day of ———, 18—, and the ——— day of ———, 18—, followed by a conveyance of the fee simple, dated the ——— day of ———, 18—, and as to the remainder of the property (being a small piece at the south-west corner) with a conveyance dated the ——— day of ———, 18— [and as to every such stipulated commencement of title the same shall be accepted as a good root of title, notwithstanding the mention of any earlier documents of title, and the seisin and title of the said corporation shall be presumed, and no objection or requisition shall be made in respect of any matter prior to the said respective commencements of title, whether recited or appearing in any abstracted document or not]. All the said conveyances purport to have been made under the Municipal Corporation Act (5 & 6 Will. 4, c. 76) with the proper approbation of Lords of the Treasury, and contain recitals or statements showing a compliance with the provisions of the Act, and no further evidence of such approbation or of such compliance shall be required, but such conveyances shall be accepted as in all respects regular and valid.

Defective conveyance open to inspection.

12. The purchasers of lots —, —, shall accept such title to the same as passed to the late [A. B.] by an indenture of conveyance dated the ——— day of ———, which may be seen during the week before the sale at the office of the said Mr. ——— [*vendor's solicitor*], and with which the abstract is to commence (*h*).

Enfranchisement (*i*).

13. The title to each lot shall commence with a deed of

(*h*) This condition may be used when the title cannot be carried back beyond a conveyance, which, on the face of it, is open to an objection which cannot be cleared up; it is, however, generally advisable to state clearly the nature of the defect, and provide in express terms that objection shall not be taken in respect thereof.

(*i*) See, as to the title to enfranchised copyhold, sect. 3, sub-

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enfranchisement, dated the ——— day of ———, 18— [and no purchaser shall require the production of, or investigate, or make any objection or requisition in respect of the prior title to the said lots respectively, whether such prior title appear by recital, statement, or otherwise, or do not appear at all (*k*)]. The enfranchisement deed has not been registered in the Middlesex Registry Office. No objection or requisition in respect of such non-registration shall be made by any purchaser, nor shall the vendors be called upon to register the same.

As to want of registration.

14. The abstract of title to the whole property shall commence with an entry in the Land Registry, dated the ——— day of ———, 18—, of an indenture of conveyance of that date.

Entry in land registry.

15. The abstract of title shall commence with an indenture dated, &c., purporting to be a conveyance to four persons, who are therein stated to have been, and they shall accordingly be taken to have been, entitled as joint tenants in equity as well as at law. One of such four persons has, by reason of two of such joint tenants having released their interests, and of the death of the other joint tenant, become entitled exclusively as between him and the other joint tenants, and it shall be so assumed by the purchaser without question.

Joint tenancy in equity.

16. The abstract of title shall commence with a conveyance dated the ——— day of ———, 18—. The charge in respect of redeemed land tax was purchased by the late [A. B.] in 18—, and was conveyed to him as personal estate by indenture dated the ——— day of ———, 18—, containing a recital (which shall be assumed to be correct) to the effect that the land tax had been formerly redeemed. The title to the land tax shall commence with the said conveyance of 18—, and the purchaser shall accept the same as a satisfactory root of title [and shall not require the production of, or investigate or make any objection or requisition in respect of, the prior title, whether such prior title appear by recital or otherwise, or do not appear at all (*k*)]; and the purchaser shall assume that the land tax referred to

Land tax redeemed.

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sect. 2, of the Conveyancing and Law of Property Act, 1881; and see *ante*, p. 634.

(*k*) The words in brackets may be omitted, if desired, being merely declaratory.

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in the said conveyance of 18— as having been formerly redeemed, and which is in such conveyance referred to as having been charged upon a messuage in ——— Street and a messuage behind the same in ——— Lane (no numbers being mentioned), was the land tax and the whole land tax charged upon the property now for sale, and was, as implied in the said conveyance of 18—, redeemed, so as to impress the charge in respect thereof with the quality of personal estate.

Leaseholds.

17. The abstract of title to lot 1 and to the freehold portion of lot 2 shall commence with the deed of conveyance by way of sale thereof to the late [A.B.], dated in 18—, and the abstract of title to the leasehold part of lot 2 shall commence with the lease thereof by the Ecclesiastical Commissioners, dated the ——— day of ———, 18—. The said lease, or a copy thereof, will be produced at the sale, and may be inspected for seven days previously thereto at the offices of the vendors' solicitors, and purchasers shall, therefore, be deemed to have notice of all the covenants, conditions, and restrictions contained in such lease; and with regard to a covenant therein contained on the part of the lessees not to assign and underlet the premises without the assent of the lessors under seal, or under the hand of their secretary or receiver for the time being, the vendors, notwithstanding such covenant, shall not be required to apply for or obtain such licence, nor shall the existence of such covenant, or of a covenant that the assignee of the lease is to pay a fee not exceeding 2*l.* 2*s.* to the lessors for registration of the assignment to him with the lessors, be an objection to the title.

Vendors not to be required to obtain licence to assign.

Leaseholds.

18. The title shall commence with a lease dated the ——— day of ———, 18—, and made between [A. B.], of the one part, and [C. D.], of the other part [and the production of a receipt for the last payment of rent accrued previously to the completion of the purchase shall be conclusive evidence that all the covenants and conditions in the lease have been performed and observed up to the completion of the purchase]. The nature of the covenants and conditions in the lease may be ascertained from the lease which will be produced at the sale, and any intending purchaser may before the sale see the lease at the office, No.—, ———, in the county of ———, of the vendor's solicitors, and the purchaser shall be deemed to have full notice of the contents of the lease.

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Leaseholds.

Purchaser to have notice of interests of sub-tenants.

19. The abstract of title to each lot shall commence with the lease under which the same is held. Such leases shall be accepted as valid, and the purchasers shall be deemed to have purchased with due notice of the contents of the said leases, and also of the agreements under which the tenants hold (which, or copies of which, will be produced at the time of sale, and may be previously inspected at the office of the vendors' solicitors), and subject to all existing liabilities under the lessee's covenants in the said leases contained; and the purchasers are to be deemed to have notice of and to take subject to the terms of all the existing tenancies.

Leaseholds; production of original lease and title to receive rent not to be required.

20. The title shall commence with an indenture of assignment dated the ——— day of ———, 18—, and the purchaser shall not be entitled to require the production of the original lease; and no evidence shall be required that the persons now in receipt of the rents payable thereunder are entitled to receive it.

Moiety purchased by owner of other moiety.

21. The abstract of title shall commence with an indenture dated the ——— day of ———, 18—, purporting to be a conveyance of an undivided moiety of certain hereditaments, of which the land now offered for sale formed part, to [A. B.], who is therein stated to have been, and he shall accordingly be taken to have been, seised of the remaining moiety thereof in his own right, and the vendor shall not be required to furnish any previous or other title to such remaining moiety.

Purchase under Act of Parliament.

22. The title to the respective lots shall commence with a conveyance on a purchase in 18— from the incumbent of a living under Act of Parliament, the property being stated in such conveyance as having been acquired by the then incumbent in 1789, and such conveyance shall be taken as good and sufficient in all respects, and no earlier title shall be required, inquired into, or objected to.

Settlement.

23. The title shall commence with an indenture of settlement dated the ——— day of ———, 18—, purporting to be a settlement of the property offered for sale (with other property). The purchaser shall not require any evidence, information, or explanation of the right of the settlor to make such a settlement, except a declaration by Mr. ———, who has for many years past acted as solicitor to the family of the vendor, that the property has, ever since the date of the settlement, been possessed and enjoyed consistently with the uses and trusts thereof.

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24. The title shall commence with an indenture dated the ——— day of ———, 18—, and expressed to be made between [*parties*], purporting to be a conveyance by way of sale to the vendors of the property now offered for sale. As, however, this restriction as to title is made only to prevent unnecessary expense to the vendors, they will, if required, supply to the purchaser a copy abstract of the earlier title, commencing with an indenture dated, &c., and expressed, &c., on payment by the purchaser of the expenses thereby occasioned, and provided the purchaser shall require the delivery of such copy abstract by notice in writing to the vendors or their solicitor within ——— days after the delivery of the abstract of the later title. The vendors shall not be required to produce or trace any evidence, or show the custody of any deed or instrument not in their possession, and no requisition or objection shall be made or taken on the ground of the vendors being unable or unwilling to produce or obtain the production of all or any of the deeds or instruments comprised or referred to in such copy abstract of the earlier title, or in the said indenture of the ——— day of ———, 18—.

Short title; earlier title to be produced at purchaser's expense, if required.

Short title; no earlier title to be shown.

25. The property forms a portion of the ——— Estate, which was for many years the seat of the late Sir [A. B.] The title to the estate is well known in the neighbourhood (*l*), and was carefully examined when the vendor's predecessors acquired the property, and accordingly it is now stipulated that the title shall commence with an indenture, dated the ——— day of ———, 18—, and made between [F. B.], Esquire (grandson of Sir [A. B.]), of the one part, and [C. D.], and [E. F.] of the other part. No earlier title shall be called for or required.

Short title; conveyance to the vendor.

26. The property now offered for sale has very recently, upon the purchase by the vendor, been investigated and advised upon on his behalf. The title at this sale shall commence with the conveyance to the vendor, which the purchaser shall assume to have been a valid, legal, and equitable assurance of the premises; and no requisition or objection shall be made as to the title previously to such conveyance, whether appearing by the abstract or not. The vendor will produce

(*l*) This statement should not be made unless it is capable of being substantiated. See *ante*, pp. 631, 632.

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to the purchasers, at the office aforesaid, free of expense, the conveyance aforesaid, subject to which all expenses of or incidental to the verifying the abstract and satisfying requisitions (whether of title, evidence or conveyance), shall be borne exclusively by the purchaser.

Surplus lands of railway company (*m*).

27. Inasmuch as the property offered for sale forms part of lands conveyed to the ——— Railway Company by an indenture, dated the ——— day of ———, 18—, the title shall commence with that conveyance, and the purchaser shall not be entitled to call for or require evidence of any of the recitals or statements contained in the said conveyance, but shall admit that everything (if anything was necessary) was done and performed by the company to enable them to sell and effectually convey the said property now offered for sale as surplus lands, and shall not call for or require production of any evidence to this effect, or of the identity of the land with that described in the conveyance.

Undivided parts.

28. As to three undivided equal sixth parts or one moiety of lot 2, the title shall commence with an indenture dated the ——— of May, 18—, being a conveyance on a sale thereof to the mortgagor [T. S.]. As to one other undivided one sixth part, the title shall commence with an indenture dated the ——— of December, 18—, being a conveyance on a sale thereof to the said mortgagor. The vendors shall not be required to show when or how the property was divided into undivided shares. As to the remaining undivided sixth parts of lot 2, the purchaser shall take without objection or requisition such title, estate or interest as belonged to the mortgagor at the date of the vendors' mortgage, on the production of a statutory declaration by the mortgagor, given to the mortgagees on the occasion of their mortgage, dated the ——— of November, 18—, of the receipt by him of the rents for his own use from the date of his purchase in 18— of the moiety aforesaid, without disturbance or interruption by any other person, or acknowledgment by him of the right or title of any other person.

(*m*) This condition will debar the purchaser from disputing the vendor's title, even though it should appear that the company had not made an offer of the lands to adjoining owners, as required by sect. 128 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and that such adjoining owners had not waived their right of pre-emption: *Best* v. *Hamand*, 12 Ch. D. 1.

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Voluntary conveyance.

29. The title shall commence with a voluntary conveyance, or deed of gift of the property, dated the ——— day of ———, 18—; the purchaser shall accept such title as passed to the grantee thereunder, and shall not require any evidence that the grantor was solvent at the date thereof, but shall assume that the said conveyance was valid, and effectual in all respects.

Waste of manor.

30. The title to the piece of land, No. —, in lot —, shall commence with a grant to the late [A. B.], of ——— acres of land from the lord of the manor of ———, to hold according to the custom, by copy of court roll; and no objection shall be made by reason of any variation in the quantity, or on the ground that the land granted was not expressed to be parcel of the waste; nor shall any evidence be required that the land was parcel of the waste, or that the lord was authorised by the custom to grant such land by copy (*n*).

Will of copyholds (before the Wills Act).

31. The abstract of title to the property comprised in both lots shall commence with the will of [*testator*], dated the 5th day of June, 1824. It shall be assumed that the said testator was, at the date of his will, and thenceforth up to his death, seized of the property in fee simple according to the custom of the manor of ———, and no evidence on this point shall be required.

Will containing general devise (since the Wills Act).

32. The abstract of title will commence with a general devise of real estate contained in the will dated the ——— day of ———, 18—, of [A. B.], who died on the ——— day of ———, 18—. The purchaser shall assume that the testator was at his death seized of the property offered for sale for an estate in fee simple, and that the same passed accordingly by the said general devise.

Will, specific devise.

33. The abstract to lot 1 will extend back for the usual period, and the abstract of title to lot 2 shall commence with the will of [A. B.], dated the ——— day of ———, 18—, and proved on the ——— day of ———, 18—, in the Principal Registry of the Probate Division, and it shall be

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(*n*) The state of the title under such grants occasionally requires such a condition; and it is to be remembered, that a defective title to a small part of the estate may entitle the purchaser to rescind the contract as to the whole, if he can show that the part of which the title is defective is material to the enjoyment of the rest; as where it is a paddock or stables, a private road, &c.

assumed that the testator was at the date of his death seized of the premises comprised in lot 2 in fee simple.

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V. Title—Evidence of Title, &c.

1. The purchaser of lot 4 shall accept such title as the vendor has (*o*). Such title as vendor has.

2. As to lot 5, the purchaser shall be satisfied with the execution of a conveyance by the vendor, and shall not require any title, or evidence of title, to be shown, or produced, or make any objection on the ground of defect or want of title (*p*), or of evidence of title. [An abstract of the vendor's title to lot 5 will be deposited at the office of Messrs. ——— & Co., the solicitors of the vendor, for seven days previous to the day of sale, and may be inspected by any intending purchaser or his solicitor, and the purchaser shall be deemed to have bought with full notice of the state of the title.] Another form.

3. As to lot 6, the purchaser shall take such title as the vendor holds under the conveyance to him, and shall not require any other evidence of title than such conveyance. Another form.

4. The purchaser of lot — shall accept such title as is disclosed by the abstract thereof, which has been open to inspection at the office of Messrs. ——— & Co. (the vendor's solicitors) in ——— since the ——— day of ———, and shall not require any further abstract or any evidence beyond the verification of such abstract, subject to these conditions. Title disclosed by abstract open for inspection.

5. The purchaser shall not require any evidence of any matter or thing admitted or proved, or found in any action in the High Court of Justice, and shall assume that all proper persons were parties to such action, and that all decrees, orders and proceedings therein were made and had in the Action.

(*o*) This condition is only applicable to the sale of a lot or property of small value. This and the two following conditions ought not to be used except in case of absolute necessity, as they are of a very stringent nature and calculated to prejudice the sale. It will generally be the more prudent course, where there is a defect in the title, to state it in the conditions, and to preclude any purchaser from making any requisition or objection with respect to it. As to the necessity that a condition intended to prevent a purchaser from objecting to a defective title, should be clear and explicit, see *ante*, pp. 663 *et seq.*

(*p*) A condition of this kind ought to be made known some time before the sale. See *Freme* v. *Wright*, 4 Mad. 364.

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presence of all proper persons, and are valid and binding in all respects.

Allotments.

6. All allotments made more than ——— years before the day of sale under any Enclosure Act or award shall, unless the contrary appears, be deemed duly made in respect of the title under which the lands taken on allotment appear by the abstract or otherwise to have been since held, and no requisition or objection is to be made in respect of any such allotment or in respect of the title to the land in respect whereof the allotment was made.

Annuity bond not to be produced.

7. The said [W. B.] sold and assigned to the said [J. B.] all the share of the said [W. B.] in the premises, in consideration of an annuity secured by a bond. The purchaser of lot 1 shall not call for the production of any abstract of or evidence as to the said bond, and shall assume that the said [W. B.] was the same person as [W. B.] the annuitant, whose death is recited in an abstracted deed.

Building society; due appointment of trustees.

8. In the year 18— a mortgage was made to three persons who purported to be the trustees of a building society, and a receipt for the money secured appears to be endorsed on the mortgage deed and signed by them as such trustees; it shall be assumed that the persons so signing were then the duly appointed trustees of the society, and accordingly that the receipt operated as a complete release and re-assignment of the mortgaged property, and no requisition, inquiry, or objection shall be made or taken as to the appointment of the trustees or the constitution of the society.

Constitution and powers of company.

9. No requisition or objection shall be made or taken as to the constitution or powers of the ——— Land Company, Limited, but each purchaser shall assume that the said company had power to acquire and dispose of the property conveyed by them as aforesaid.

Constitution and rules of society.

10. The ordinary prints of the rules and orders of the said ——— Society contained in their annual reports shall be accepted as conclusive evidence of such rules and orders, and a copy certified by a person describing himself as the secretary of the society to be a true copy of any resolution stated to have been passed at any meeting either of the society or of its standing committees, shall be accepted as conclusive evidence of the passing and contents of such resolution, and of its validity, and no purchaser shall be entitled to production of any of the rules, orders, minutes, or books or records

of the society, or to any covenant, acknowledgment, or undertaking in relation thereto.

Crown grant.

11. The purchaser shall not be entitled to require the production of a copy of any grant from the Crown.

Crown grant.

12. The purchaser of lot ———, which is held under an old grant from the Crown, shall not require any copy or abstract of such grant, nor any evidence of such grant, except the recital thereof in the modern documents; nor shall he require any deduction of the intermediate title, except for the last ——— years; nor any evidence of the identity of the lands included in such lot with the lands included in the said grant.

Death of annuitant.

13. No purchaser shall require any evidence of the death of [*annuitant*], an annuitant under the will of [*testator*], who, in a memorandum endorsed on a deed dated in 18—, is stated to have died in France.

Deed missing to be evidenced by attested copy.

14. It is apprehended that an indenture dated the ——— day of ———, 18—, being a settlement of the property offered for sale (with other property), was accidentally destroyed by fire in the year 18—; the purchaser shall be satisfied with the production of an attested copy of the said indenture as sufficient evidence of the contents and due execution of the original.

Deed missing to be evidenced by recitals in subsequent deed.

15. As to lot 1, a conveyance thereof, believed to have been made in the year 18—, is not in the vendor's possession, and it is not known in whose custody the same now is, or whether it is in existence. No abstract or copy of such conveyance shall be called for, but a recital thereof contained in a subsequent conveyance of the property by way of mortgage, dated the ——— day of ———, 18— (which mortgage has since been paid off, and the property reconveyed), shall be taken to be conclusive evidence of the material contents and due execution of the missing deed, and no objection or requisition shall be made in respect of the non-production or non-existence thereof.

Deeds not in vendor's possession not to be required.

16. The vendor shall not be required to produce any deed or document not in his possession, or to procure any copy or abstract thereof, or any covenant, acknowledgment or undertaking in respect thereof, or to give any information or explanation as to the custody thereof, or otherwise in relation thereto; and if the vendor shall produce any copy or abstract of any deed or document not in his possession, such

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copy or abstract shall be accepted without verification as sufficient evidence of the contents and due execution of such deed or document.

Dower.

17. It shall be assumed that no wife or widow of any former owner is entitled to dower or freebench unless it appears on the abstract that he was married.

Equitable interest of railway company.

18. It is believed that the ——— Railway Company had some interest in the property, and they concurred under the seal of the company, with the owner of the property offered for sale, in an indenture dated, &c., whereby the property was conveyed by way of sale to the testator under whom the present vendor claims. The purchaser shall make no inquiry under what circumstances such interest was acquired by the company, and shall not make any investigation or requisition nor take any objection in respect thereof.

Exchange.

19. The vendor shall not be required to produce, for any purpose, any evidence or documents of title to the lands which have been taken in exchange [upwards of ——— years ago], anterior to the deeds by which such exchanges have been effected, nor to deduce the title to the lands given in exchange.

Jurisdiction of Court to order sale (*q*).

20. The Court having seen fit to order a sale of the reversion expectant on the life interest of [A. B.], notwithstanding several infants were, and are still, interested in the reversion, the jurisdiction of the Court to make such order shall not be questioned, nor shall any objection or requisition be made on account of such order.

Land tax, redemption of.

21. No evidence shall be required of the redemption of the land tax, except a certificate or declaration of the vendor's steward or agent, to be made, if required, at the purchaser's expense, that with the exceptions noted in the particular, the property is not now assessed to the land tax, and that no land tax has been paid in respect thereof for ten years now last past.

Land tax, redemption of.

22. No evidence shall be required of the freedom from land tax of any part of the property, except a certificate

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(*q*) This form may be easily adapted to any case where there is a doubt as to the jurisdiction of the Court to make an order for sale. It would appear that the Court has power to order a sale of an infant's reversionary personal estate: see the observations of *James*, L. J., in *Nunn* v. *Hancock*, L. R., 6 Ch. A. 850; but the point has not been as yet expressly decided.

of redemption, dated in 1799, and a statutory declaration made in the year 18— by a former owner of the property, that he had not paid or been called upon to pay any land tax; but the vendors shall not be required to identify the property described in the particulars with that described on the certificate.

Land tax, redemption of.

23. The purchaser shall require no evidence of the redemption of the land tax, except a certificate of the collector that no land tax is payable in respect of the property offered for sale.

Land tax, property on which assessed, not ascertained.

24. With the exception of a sum of 14*l.* 18*s.* 8*d.*, which is payable for land tax and assessed on some part of the property offered for sale, the property is free from land tax. Inquiries have been made with the view of ascertaining, if possible, on what portion of the property offered for sale the above-mentioned sum was assessed, but without success. It shall therefore be assumed, without requisition or objection of any kind, that the sum of 14*l.* 8*s.* 8*d.* is a charge on some part of the freehold portion of lot 1, and shall be paid by the purchaser of that lot. Where no certificate of the redemption of land tax can be produced, the respective purchasers shall not require any evidence of any of the lands being free from land tax, beyond a statutory declaration that none is now paid beyond the sum of 14*l.* 8*s.* 8*d.*, or that the property is not now assessed to the land tax.

Leaseholds; observance of covenants where rent nominal.

25. The property being held under a lease at a nominal rent, the mere fact of possession shall be taken as sufficient evidence of the performance and observance of all the lessee's covenants in the lease.

Leaseholds; last receipt for rent to be conclusive as to observance of covenants.

26. The production of the receipt for the last payment of rent which shall have accrued due under any lease shall be deemed to be conclusive evidence that all the covenants and conditions in such lease have been observed and performed up to the day of actual completion of the purchase, or that all breaches thereof (if any) have been waived.

Leaseholds; observance of covenants, and title to receive rent.

27. As respects lot 5, the production of the receipt for the rent which last accrued due under the lease of the ——— day of ———, 18—, or satisfactory evidence of the payment of such rent, shall be accepted as conclusive evidence, and as respects the remainder of the property, the lease whereof is at a peppercorn rent, it shall be assumed, without

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evidence, that all the covenants and conditions of such leases have been fulfilled, or that all breaches (if any) of such covenants and conditions, or any of them (whether appearing by the abstract or otherwise or not), have been effectually waived down to the time of completion of the purchase, including the interval between the contract for sale and such completion, and that the said leases are then valid and subsisting; and as respects the rent reserved on the lease of lot 5, no evidence shall be required of the fact that the parties giving such receipts or receiving such rent were entitled so to do.

Leaseholds; nature of covenants.

28. The property is held under a lease dated the ——— day of ———, 18—, and the nature of the covenants and conditions therein contained may be ascertained from the lease, or a copy or abstract thereof, which will be produced, and may be examined at the office of the solicitors of the vendor at any time in business hours for ——— days immediately preceding the day of sale.

Leaseholds; mesne assignments not to be required.

29. The vendor will furnish an abstract of the lease dated the ——— day of ———, 18—, under which the property is held, and also of the assignment of the same lease to the vendor, dated the ——— day of ———, 18—. The abstract will contain only these two documents, and no requisition, objection, or inquiry, shall be made in respect of the intermediate title.

Leaseholds renewable.

30. The vendor shall furnish an abstract of the lease, dated the ——— day of ———, 18—, under which the vendor holds. The lease was granted upon the occasion of the surrender of a former lease, being, as may be inferred from the abstract of the former lease and other documents, one of a series of leases all containing covenants for perpetual renewal, similar to that in the existing lease. The vendor will also furnish an abstract of the instruments (other than the surrendered leases and the surrenders thereof), dealing with the leasehold interest, commencing with an assignment dated the ——— day of ———, 18—, but the purchaser shall not, except as hereinafter mentioned, call for the production of, or investigate, or make any objection or requisition in respect of any surrendered lease or leases; and the production of a receipt for the last payment of rent, accrued previously to the completion of the purchase, shall be conclusive evidence that all the covenants and conditions in the lease have been performed and observed up to the

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completion of the purchase. The nature of the holding, and also of the covenants and conditions in the lease, and also the nature of the perpetual right and obligation of renewal, may be ascertained from a copy or abstract of the existing lease, which will be produced at the sale, and the purchaser shall be deemed to have notice of all the contents of the lease. The vendor has in his possession an abstract (copied from an old abstract) of a lease of the ——— day of ———, 18—, being the former lease above referred to, which will be produced and handed over to the purchaser, but the vendor shall not be called upon to give any information concerning it or any other surrendered lease, except such information (if any) as is contained in the abstracted documents, and the abstract of the said former lease of the ——— day of ———, 18—.

Leaseholds; leases to be presumed to have determined.

31. Certain leases and agreements mentioned in deeds dated in and prior to the year 18— shall be presumed to have determined, and no requisition, objection, or inquiry shall be made in respect thereof.

Leaseholds for lives.

32. The statement in the particulars of the ages of the several persons for whose lives the property is now held on lease, is taken from a statement of such ages contained in the subsisting lease of the property, and the purchasers shall not require any evidence of the ages of such persons, other than the statement in the said lease.

Legacies; declaration as to payment.

33. A statutory declaration, which was made on the occasion of a conveyance by way of mortgage of the property in 18—, that all legacies given by the will of [A. B.] had been paid, shall be accepted as conclusive evidence of that fact.

Legacies and annuities, no evidence as to payment.

34. The purchaser shall not require any evidence that the legacies and annuities given by the will of [A. B.], who died in the year ———, have been paid or have ceased.

Legacies and arrears of annuity presumed to be paid.

35. No evidence shall be required of the payment or other discharge of any legacy or sum of money charged by any will which became payable more than ——— years since, nor of the payment of arrears of life annuities which have ceased or expired more than ——— years ago (*r*).

(*r*) It is not sufficient to show that an annuity has ceased; it must also be shown that no arrears remain unpaid. See *Wynn* v. *Williams*, 5 Ves. 130. An annuity charged on land is within the 42nd section of the Statute of Limitations (3 & 4 Will. 4, c. 27), and consequently arrears are generally recover-

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Legal estate outstanding.

36. The tracing and getting in of any outstanding legal estate or interest which any purchaser shall require to be traced and got in, and all searches, inquiries, and journeys for such purposes or any of them, shall be at the expense of the purchaser requiring the same.

Mortgage, satisfaction of.

37. As to lot —, the purchaser shall not require any other evidence of the satisfaction of a mortgage, dated in 18—, than the production of the mortgage deed from the vendor's possession, and the vendor's statutory declaration that no payment or demand of payment of interest or principal has been made during the last ——— years; and the purchaser shall assume without question that the legal estate has been duly reconveyed, and is now vested in the vendor.

Mortgagee's title under Statute of Limitations.

38. The vendor shall not be required to produce any evidence of title to lot —, other than an indenture of mortgage, dated the ——— day of ———, 18—, and a statutory declaration by the vendor, that he has been in possession for a period of twelve years and upwards, without having received interest, or given to any person any acknowledgment of the title of the mortgagor or of his right or equity of redemption.

Notices under Settled Land Acts.

39. The purchaser shall assume that all notices required by the Settled Land Acts have been duly given or waived, and shall not make any requisition, objection, or inquiry in respect to any such notice.

Old abstract to be evidence.

40. An abstract, dated in the year 18—, shall be accepted as sufficient evidence of the contents and due execution and attestation of two deeds therein abstracted, and stated to bear date, &c. respectively, such deeds being recited or referred to in a purchase deed, dated, &c., which will be produced.

Pedigree (*s*).

41. The purchaser shall not require any evidence of the birth or death of any person, or of any fact or matter relating to the pedigree of the vendor, other than the statutory declaration of ———, who is related to the family.

Policy of insurance on life of assured.

42. The age of the assured was admitted on the policy, and such admission shall be deemed to be sufficient evidence that

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able for six years only; but even if the annuity has ceased for that period it may be advisable to insert this provision to meet the possible chance of a subsequent acknowledgment in writing in respect of the arrears.

(*s*) As to evidence of pedigree, see *ante*, tit. Abstracts, Vol. I. pp. 147 *et seq.*

he was, at the date of the policy, of the age therein mentioned. No further evidence of the validity of the policy and of the accuracy of the statements upon which it was granted shall be required than the production of the receipt for the premium last due.

Policy on the life of a third person (*t*).

43. No further evidence of the validity of the policy comprised in lot — shall be required than the statutory declaration of Mr. ———, on whose life the policy was effected, that when the policy was effected he was in a good state of health and of the age mentioned in the policy, and the production of the receipt for the last premium, and the statutory declaration of Mr. ———, that when the policy was effected he had an insurable interest in the life mentioned in the policy to the amount of ———.

Possessory title.

44. The ground floor of a small portion of lot 1 at the north-west corner thereof, measuring about 10 feet by 5 feet, and coloured purple on the plan, was omitted from the conveyance to the late [A. B.], and was excepted out of the conveyance thereof to the vendor's testator; but all the floors above the ground floor are part of the property now sold, and have been in the occupation of the vendors, or their predecessors in title, or their lessees, since 18—, without interruption or adverse possession. The purchaser of that lot shall accept a statutory declaration of such occupation, which was made on the occasion of the purchase of the premises by the present vendor's testator as conclusive evidence of the vendor's title to the said part of lot 1.

Possessory title.

45. As to lot 2, the purchaser shall not require any evidence, information or explanation of the title of the vendor other than a statutory declaration, to be made by an old inhabitant of the parish of ———, to the effect that the last-mentioned lot has been for at least ——— years in the undisturbed possession of [*testator*], and of the persons claiming under his will, and also a counterpart of a lease of the same lot granted by the said [*testator*] in the year 18—.

Possessory title.

46. As to lots — and —, the title shall commence with evidence of the possession in the year ———, of the party under whom the vendor claims, and the purchaser shall not investigate or object to the earlier title.

(*t*) See as to insurance by one person on the life of another, stat. 14 Geo. 3, c. 48, s. 1; *ante*, p. 689.

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47. All facts and matters admitted or proved in the above-mentioned action, or certified by the chief clerk of the judge shall be deemed thereby sufficiently proved.

Proceedings in action.

48. The vendors shall not be required to produce or to furnish any abstract, copy, or evidence of the proceedings in the above-mentioned action, except an abstract of the order under which the sale is made; nor shall they be bound to enrol the said order or any of the proceedings. Nor shall the purchaser make any inquiry or objection as to the parties to the suit, or the regularity of the proceedings.

Possibility of issue.

49. That the purchaser shall not object to the title of part of lot —, on account of the possibility of a lady, aged fifty-two years and unmarried, marrying and having issue (*u*).

Power of attorney.

50. Any surrender of or admittance to the property made pursuant to power of attorney shall be assumed to have been duly authorized by the power under which it appears on the court rolls to have been made, and production of the power shall not be required.

Power of attorney.

51. Where any deeds shall purport to have been executed by attorney, the vendors shall not be required to show that the principal was alive at the time of execution (*v*).

Possibility of issue.

(*u*) In a case of this kind it is well to provide against the risk of dispute by a special stipulation. Where, however, the age is such, according to the ordinary course of nature to place this event beyond all risk, probably a purchaser would not be allowed to make the legal possibility of issue an objection to the title. In *Fraser* v. *Fraser*, 1 Jac. 586 n, Sir *W. Grant*, M. R., decreed payment of a legacy, on the evidence that the female to whose issue it was given was of the age of fifty-five and unmarried; and funds in Court have, in recent times, frequently been ordered to be paid out on the presumption that females who had attained ages even less advanced were past child bearing; the earliest age at which such a presumption has been acted on in any reported case would appear to be forty-seven years upon evidence as to the state of health: *Re Sumner*, 22 W. R. 639; see also *Conduit* v. *Soane*, 19 W. R. 817; *Re Belt*, 25 W. R. 669; so where a woman had attained forty-nine years and nine months, having been long married without having had issue: *Re Millner*, L. R., 14 Eq. 245; see also *Re Allason*, 36 L. T., N. S. 653; so also where a spinster had attained fifty-four years: *Davidson* v. *Kimpton*, 18 Ch. D. 213. But in *Croxton* v. *May*, 9 Ch. D. 388, where a woman aged fifty-four and a-half years had been married only three years, the Court refused to act on the presumption.

(*v*) In cases where an instrument executed by attorney has been so executed pursuant to a power created otherwise than

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Power of attorney.

52. Lot 1 was purchased by the vendors in 18—, and the conveyance on that occasion, as regards two of the conveying parties, appears to have been executed by attorney. The vendors have attested copies only of the powers of attorney, and no purchaser shall require the production of the originals, or any covenant, acknowledgment or undertaking in relation thereto; one of such powers of attorney appears to have been given in India, and is not under seal. The purchaser of lot 1 shall assume that the respective parties so conveying by attorney as aforesaid, or purporting so to do, were living at the date of the said conveyance of 18—, and shall make no objection or requisition on the ground of that conveyance having been executed by attorney, or on the ground of one of the powers of attorney not being under seal, but shall accept that conveyance as satisfactory and sufficient in all respects.

Recitals to be evidence.

53. Every recital or statement, whether of fact or conclusion of law, contained in any abstracted deed, will, or other document, dated fifteen years prior to the day of sale, shall be sufficient evidence of the fact, conclusion, or matter, so recited or stated.

Recitals to be evidence.

54. The said deed of enfranchisement of the ——— day of ———, 18—, and every other deed, entry on, or copy of court roll or document dated more than fifteen years ago, shall be conclusive evidence of everything recited, stated or noticed, assumed or implied therein, and of the contents and due execution of every deed, will, or other document recited, stated, or noticed therein, and of which neither the original nor an attested copy, nor the probate, nor an office copy, nor an effective covenant for or acknowledgment of the right to production is in the vendor's possession, and shall also be conclusive evidence that no such recited, stated or noticed deed, will, or other document contained anything material to the title other than what is so recited, stated or noticed, and the purchaser shall not require the production of, or make any objection or requisition in respect of any such deed, will, or document (*w*).

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under sects. 8 and 9 of the Conveyancing Act, 1882, it is incumbent on a purchaser to ascertain that the principal was alive at the time of the execution of the instrument. See Wolst. Conv. Acts, p. 100.

(*w*) This condition is more stringent than the statutory condition, and may on occasions be useful: see *ante*, pp. 633, 676 *et seq.*

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55. The estate comprised in these particulars having been formerly sold under an order of the Chancery Division of the High Court of Justice with other property, the recitals contained in a certain indenture, dated, &c. (being the conveyance in pursuance of the said order under which the vendor claims), shall be deemed sufficient evidence of the facts, things, and matters, both of fact and conclusion of law, and the contents and execution of the several deeds and documents therein recited or mentioned.

Recitals in conveyance under order of Court to be evidence.

Rent, premises sold free and indemnified from.

56. The premises, the subject of this sale, are sold freed and discharged in manner hereinafter mentioned, but not further or otherwise, from all rents payable under the said lease, the owner of the premises No. —, ——— Street, comprised in the said lease as aforesaid, having by a deed, dated the ——— day of ———, 18—, covenanted with the vendor to pay the rents reserved by the said lease and thenceforth to become payable, and to observe and perform the covenants and conditions of the said lease, and to keep the vendor, his heirs, executors, administrators and assigns indemnified against all claims and demands by reason of the non-payment of such rents, and also against the non-observance or non-performance of any of the covenants, conditions and agreements contained in the said lease so far as such covenants, conditions and agreements relate to the premises No. —, ——— Street aforesaid. The vendor shall nevertheless be entitled to a covenant by and at the expense of the purchaser, so far as regards the premises the subject of this sale, that the purchaser will observe and perform the covenants and provisions of the lease and indemnify the vendor, his executors, administrators and assigns in case of any non-performance or non-observance thereof. The premises being sold discharged from the said rents in manner aforesaid the mere fact of possession under the said lease at the time of completion of the purchase shall be accepted as sufficient evidence of the due performance of the lessee's covenants up to that time, and the purchaser shall not be entitled to make any requisition as to the performance of the said covenants, or any of them.

Purchaser to indemnify vendor as to covenants in lease.

Possession to be evidence of performance of covenants by vendor.

Rent, creation of.

57. Some part of lot —, reputed to be holden of the lord of the manor of ———, appears to be subject to a chief rent of ———, and a heriot in kind, payable on the death of every tenant; the said lot is sold subject thereto, but the vendor shall not be required to adduce any evidence as to the

origin or creation of the said rent or heriot, or to identify the part of such lot on which the said rent and heriot are charged.

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58. No requisition, objection or inquiry shall be made as to the creation or origin of the said fee-farm rent, or of any quit or other rents, fines or heriots.

Rents, creation of.

59. Lot 1 is, under an indenture dated the ——— day of ———, 18—, subject to a rent-charge of £———, and to a covenant to build and maintain on the premises a dwelling-house in accordance with the plans approved by [A. B.]. By the same indenture a general power, unlimited in point of duration, is expressed to be conferred of purchasing the rent-charge for the sum of £——— on three months' notice, to the said [A. B.], his heirs or assigns. Lot 2 is subject to a similar rent-charge of £———, similar covenants, with a similar right of purchase of the rent-charge. The said lots 1 and 2 will be sold subject to the said rent-charges and covenants, and with the benefit of the said option of purchase. Production of the receipt of the said [A. B.] for the last instalment of rent-charge shall be conclusive evidence of performance of the covenants up to the date of completion. A copy of the deed dated ——— day of ———, 18—, can be inspected at the offices of the auctioneers fourteen days previous to the auction, and the purchaser shall be deemed to have notice of the contents thereof.

Rent-charge, and building covenants.

Last receipt to be evidence (*x*).

Deed creating rent-charges deposited for inspection prior to sale.

60. The fee farm rent of 2*l.* 5*s.* 6*d.*, mentioned in the particulars of lot 1, appears from the recitals in the said indenture of 27th July, 1872, to be a part of a like rent of 4*l.* 11*s.*, created in or previously to the year 1798: and the rent of 1*l.* 10*s.* mentioned in the particulars of lot 2 appears to be part of a like rent of 2*l.* 5*s.* 6*d.*, created in the year 1796. The vendors shall not be required to furnish any information respecting any of the above-mentioned rents except such as may appear by the abstracted instruments. As regards each of the rents mentioned in the particulars, a receipt for the rent which shall have last accrued previously to the day fixed by these conditions for the completion of the purchase

Rents, fee farm.

Last receipt to be evidence; title of person giving receipt not to be inquired into (*x*).

(*x*) The statutory condition contained in the Conveyancing and Law of Property Act, 1881, sect. 3, sub-sects. (4) and (5), applies only to leaseholds; it is therefore necessary, when dealing with property out of which fee farm rents or other rent-charges are issuing, to insert the condition as to the last receipt being evidence, as formerly.

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shall be accepted as sufficient evidence that all covenants and conditions affecting the premises have been performed and observed up to the date of such receipt: and the purchaser shall assume the person by whom such receipt purports to be signed to have been at the date thereof the person duly qualified to give a valid discharge for such rent, and to have duly signed the same receipt. No purchaser shall make any objection, requisition, or inquiry on account of the persons entitled to the said larger rents of 4*l.* 11*s.* and 2*l.* 5*s.* 6*d.*, not having concurred in the apportionment thereof or otherwise on account of such larger rents, or on account of any rent antecedent to any of the rents mentioned in this condition, should there be any such antecedent rent: nor shall any purchaser require a surrender of the legal estate in any of the premises by any person holding such legal estate as a trustee for the purpose of securing the rents mentioned in the particulars, and to which the sale is subject as therein mentioned, or either of such rents.

Rents and reliefs on sale of customary freeholds.

61. The property is subject to certain reliefs, payable on death or alienation, and quit rents to the lady of the manor of B., and a payment to the Commissioners of the ——— Valley Drainage. The lady of the manor has agreed, on payment of a sum of 150*l.*, to sell all her estate and interest whatever in lot 2, and to convey and assure the same to a nominee of the trustees of the late Mrs. A. The purchaser of lot 2 may, if he so desire, be nominated as the purchaser of the lady of the manor's interest. If the purchaser shall desire to buy up the interest of the lady of the manor, he shall not require any evidence of the title of the lady of the manor to the manor of B., other than such as she will be willing to give, and the purchaser so desiring to purchase the interest of the said lady of the manor, shall, at his own expense in all respects, carry out the purchases. Inasmuch as the property has been for many years treated as ordinary freehold, the purchasers shall assume, without objection or requisition of any kind, that the actual freehold of all lands liable to the payments of reliefs and quit rents, or which by reason of such payments or otherwise, might be considered as in the nature of customary freehold, is in the tenant. No purchaser shall be entitled to require any evidence, beyond what may be in the vendor's possession, as to what parts of the lot or lots purchased by him are subject or liable to the

said drainage rate, reliefs, or quit rents. The several lots are sold subject to the several payments and to all liabilities mentioned in the particulars and conditions, and to all other drainage rates, quit rents, reliefs, payments, or liabilities of a similar nature (if any) affecting the same respectively.

Rent-charge; creation and apportionment.

62. Inasmuch as the fee-farm rent of 10*l.*, issuing out of lot —, forms part of a rent of 50*l.*, which, in the year 17—, was granted out of a larger piece of ground, and the remainder of such rent of 50*l.* is amply secured by the residue of the ground charged therewith, the vendor shall not be required to prove the creation or apportionment of the original rent, or the discharge of the premises therefrom, or its being sufficiently secured out of the other part charged, otherwise than by producing the receipts for the said rent of 10*l.*, for the last ——— years.

Sporting rights.

63. A statutory declaration that the owners of the estate, in common with the other freeholders of the manor of ———, have always claimed and exercised the right of shooting over the ——— Moor, shall be accepted as sufficient evidence of the right.

Slips by roadside.

64. Lot ——— contains some small slips of land lying between the ancient boundaries of the ——— Estate and the high road which have been inclosed several years. The purchaser shall be satisfied with the possession of such slips of land, and shall not require any title thereto.

Succession duty.

65. On the purchase of lot 4 by the mortgagor from [A. B.], and his mother [F. B.], [A. B.] covenanted to pay all succession duty which might have become payable on the death of the said [F. B.] in respect of the succession of the said [A. B.]. The vendor's solicitor satisfied himself, on the mortgage being taken, that such succession duty had been duly paid, and the purchaser shall be satisfied with such covenant, and shall not make any requisition or objection with respect to the said succession duty.

Stamps and registration.

66. No objection shall be made on the ground of the non-production of the original of any deed or document of which an attested or office copy is produced, or on the ground of any deed or document of title being unstamped or insufficiently stamped, or on account of any deed or document not being registered in the Middlesex Registry, and if such stamping or registration cannot be rectified or effected, the

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sale shall not be annulled, nor any objection to the title made on that account.

Stamps.

67. If the [any] purchaser shall require any unstamped or insufficiently stamped deed or document, dated ——— years or more prior to the day of sale to be stamped, the same shall be stamped at his expense [*or* at the expense of the purchaser requiring the same]; but the completion of the purchase is not to be delayed on that account.

Stamps and registration.

68. If any document of title shall be found to be unstamped, or insufficiently stamped, or not to be registered (which, however, is not known to be the case), the expense of stamping or registration, if required by the purchaser, shall be borne by him, and no objection shall be made by the purchaser on account of the absence or insufficiency of any stamp, or the want of registration. The leases and agreements under which the tenants of the estate hold are believed to be sufficiently stamped [and registered]. No purchaser shall make any objection or requisition in respect of any defect in stamping [or registration] if any be discovered.

Tithes, exemption from.

69. The vendor shall not be required to furnish any evidence of the exemption of the property from tithes, beyond a statutory declaration by the occupier that no tithe or rent-charge or other payment in lieu of tithes has been paid or demanded in respect thereof for the last ——— years.

Tithes, exemption from.

70. The declarations of occupiers, that during the last ——— years no tithes, compositions, or modus have been paid, rendered, or demanded, in respect of the several lots, shall be conclusive evidence that such lots are tithe free.

Tithes, exemption from.

71. By an award of the A——— Inclosure Commissioners, dated 8th April, 1759, inrolled in the office of the clerk of the peace of the county of B———, certain allotments were made to the rector of the parish of ——— in lieu of rectorial tithes, and allotments were also made to the vicar in lieu of vicarial tithes within the parish of A———: and by an award of the Inclosure Commissioners of the parish of C———, dated the 23rd day of December, 1766, and inrolled in the office of the clerk of the peace aforesaid, certain allotments of land were made to the patron and rector in lieu of rectorial tithes, and a certain allotment was also made in lieu of glebe within the parish of C———. No purchaser shall require any evidence, beyond that afforded

by the inspection of these several awards, that the lands in the several parishes of A——— and C——— are tithe free.

Underlease, covenants in.

72. No objection shall be made on account of the covenants by the lessee in any underlease not corresponding with the covenants by the lessee in the lease or underlease under which the property is held, or in the superior lease.

Condition as to commencement and deduction of a complicated character (*y*).

73. The property is held as follows, viz. :—Lot 5 is held under an original lease, dated the 20th March, 1827, from [A. B.] to [C. D.], for a term of $83\frac{3}{4}$ years, from the 24th June, 1825, at a rent of 16*l.* 16*s.*, and a penal rent upon breach of covenant against carrying on prohibited trades; and such lease was subsequently assigned by [C. D.] to [G. H.], who mortgaged it by demise for the residue of the original term, less three days, to [S. S.], for securing 2,000*l.* and interest at 5*l.* per cent. per annum. The remainder of the property is held under an original lease, dated the 1st September, 1828, from the same lessor to the said [G. H.], and for a like term at a peppercorn rent and a like penal rent. [G. H.], by indenture dated the 5th January, 1829, charged this part of the property with payment of the 2,000*l.* and interest, by way of further security, and agreed to execute on request a legal mortgage, which has not, however, been executed. The abstract of title is to commence with the said original leases. By indenture of settlement, dated the 2nd January, 1839 [G. H.], demised both parts of the property to [W. H.] and [C. H.] for the residues of the original terms, less ten days respectively, and subject to the rents and covenants of the original leases and to the mortgage securities to [S. S.] in trust to sell. The present sale is by order of the Court in an action for administering the trusts of the said indenture of settlement, and is of the derivative terms created or expressed to be created by that indenture and subject to the said mortgage securities, and no requisition shall be made in respect to the reversions which remained vested in [G. H.], or as to the derivative lease of lot 5, upon the ground that it was merely an equitable demise. Contemporaneously with the indenture

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(*y*) This condition is inserted as a specimen of the mode in which stipulations with regard to a complicated title may be arranged, a matter which often requires considerable care and nicety.

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of settlement, a deed of declaration of trust of the proceeds of sale and rents until sale was also executed, and will, as regards the trusts thereby declared, be included in the abstract; the recitals therein, which are very lengthy, and which show that the settlement was executed by [G. H.] in satisfaction or compromise of a sum due from him in respect to other trust moneys, will be shortly abstracted, but will not be set out or abstracted in full, except at the request and expense of the purchaser, nor (whether so set out or abstracted or not) shall any objection or requisition be made in respect to any of the matters therein stated or referred to.

Expenses of making copies of deeds, &c. whether in vendor's possession or not, to be borne by purchaser.

74. In addition to all expenses by law made payable by a purchaser, the [each] purchaser shall bear all expenses of and incidental to making, procuring, verifying, furnishing, producing, and examining all attested, stamped, office, or other copies and abstracts of and extracts from Acts of Parliament, inclosure awards, records, proceedings of Courts, Court rolls, deeds, wills, probate, letters of administration, and other documents, whether in the vendor's possession or not, which the [any] purchaser may require, for whatever purpose the same may be required respectively, and of and incidental to all inquiries, searches, and journeys incident to any of the purposes aforesaid.

VI. Identity of Parcels.

Statutory declaration.

1. The purchaser shall be satisfied with such evidence of the identity of the property as is afforded by the deeds abstracted, and shall not require any further or other evidence on this head, except that he shall be entitled to a statutory declaration by some competent person (to be obtained at his own expense) that the property sold has been held and enjoyed in conformity with the title shown by the abstract for upwards of twelve years before the day of sale.

Statutory declaration.

2. Should any question arise as to the identity of the premises described in the particulars with the premises described in the documents abstracted, the purchaser shall be furnished at his own expense with a statutory declaration that the premises have been held in conformity with the title as deduced for twenty years last past, except in cases where the title is by these conditions limited to commence at a shorter date than twenty years, and in such cases, for the period for which the

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title is shown, and thereupon the requisition in respect of identity shall be considered as satisfied.

As to measurements.

3. No requisition or objection shall be made or taken on the ground of any discrepancy between the former and present measurements of any lot.

As to different tenures.

4. The vendor shall not be required to distinguish the freehold from the copyhold parts of any lot, nor to distinguish copyholds of different manors.

As to different tenures.

5. The vendors shall not be required to distinguish the parts of any lot held under different titles, nor to distinguish the copyhold part of lot 1, nor to distinguish the leasehold part of any lot, further than the same can (if at all) be distinguished by the descriptions in the abstract; and no purchaser shall require any evidence of the ages stated in the particulars of the life or lives in any lease beyond the statement (if any) in the lease, or such other evidence (if any) as the vendors are able to furnish at the expense of any purchaser who may require such evidence.

Evidence of age of *cestui que vie*.

Boundaries of manors.

6. The vendor shall not be required to show the boundaries or limits of the respective manors included in the sale, or to specify the particulars of the boundaries or rights (if any) belonging thereto, or to distinguish the tenements or properties comprised therein upon or out of which any quit or other rents or payments are, or may be, charged or issuing, or to furnish any other information in relation to such manors, or either of them, further or otherwise than the same respectively may be shown by the manorial books and documents in the vendor's possession, and no objection shall be taken on account of any such books or documents being defective or wanting. The statements of facts contained in the particulars are believed, and in the absence of evidence to the contrary shall be presumed to be correct, but the vendor shall not be required to verify the same.

Discrepancies of description.

7. The vendor shall not be required to distinguish the copyhold from the freehold portions of the property, or to distinguish the portion of the property in respect of which the yearly rent-charge of £———, or any other rent, or any annual payment mentioned in the particular is payable, or to identify or connect any of the descriptions in the several deeds or documents abstracted with each other, or any of such descriptions with the description in the particular, and no further evidence of identity shall be required.

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Discrepancy between old and present measurements.

8. The property is believed and shall be taken to be correctly described as to quantity and otherwise. The descriptions and quantities in the particular have been taken from a survey made, it is believed, between the years 18— and 18—, by the Crown surveyor and the ordnance survey; and the vendor shall not be required to account for the fact that the entire quantity in the particular exceeds the quantities set forth in the muniments of title.

Change of number in street.

9. The premises were formerly known as No. —, in C——— Road aforesaid, and the purchaser shall not make any objection or requisition on this account, or require any evidence of the change of numbers.

Indentity of town house.

10. Lot 2 in the said lease, is described as on the east side of A——— Square, and as being the third house south from B——— Street, and the purchaser shall require no further evidence of its identity with the premises now known as No. 3, C——— Square.

Identity of part sold to former purchaser.

11. As regards lots 2 and 3, the respective leases formerly comprised other property which was taken by the Metropolitan Board of Works, but no evidence shall be required as to the part so taken.

VII. Fixtures—Timber (*a*)—Crops, &c.

Timber, fixtures, &c.

1. All timber and timber-like trees, pollards, tellers and saplings, down to the value of one shilling per stick inclusive, and also the fixtures, shall be valued within twenty-one days after the sale, and the price thereof paid by the purchaser as part of his purchase-money or sum bid; such valuation to be made by the auctioneer [*or* by two referees or their umpire, to be chosen in the usual manner], who shall determine what articles are within this condition. The amount of such valuation shall be considered as part of the purchase-money.

Timber at a valuation already made.

2. The timber and timber-like trees, tellers, pollards and saplings have been valued by Mr. ———, the auctioneer, at the following sums, that is to say, as to lot 1, £———; lot 2, £———, &c. Each purchaser shall, on completing his purchase, pay in addition to the balance of his purchase-

(*a*) Trustees ought not to sell timber separately from the land unless expressly authorized so to do by the instrument creating the trust: *Cholmely* v. *Paxton*, 3 Bing. 207.

money, the amount of such valuation in respect of the lot or lots purchased by him.

VII. Fixtures, Timber, Crops, &c.

3. The timber and timber-like trees, tellers, pollards and saplings, down to the value of one shilling per stick inclusive, and the underwoods and plantations down to the stem (except the shrubs, plants, and fruit and other trees in the flower garden and kitchen gardens adjoining the dwelling-house), and the tenant's fixtures in and about the dwelling-house, and all iron hurdles and iron fencing, and also all agricultural machinery and implements, and the growing crops, hay and straw, dung and compost on lands in hand, at market price, and all arts of husbandry, tillages and workmanship of fallows, and all rights usually appraised by the custom of the country (*b*) as between an incoming and an outgoing tenant, shall be paid for by the purchaser at the time fixed for the completion of the purchase at a fair valuation, such valuation to be made by two referees, one to be nominated by the vendor and the other by the purchaser, or by an umpire to be appointed by such referees before proceeding to a valuation; but if either the vendor or purchaser shall refuse or neglect to nominate a valuer, and to notify such nomination in writing to the other of them before the ——— day of ——— next; or if the valuer nominated by either party shall refuse or neglect to act, then the decision and valuation shall be made by the referee (if duly notified as aforesaid) of the other party alone; and the referees or referee, or umpire, shall have power to determine what are tenant's fixtures within this condition.

Timber, fixtures, crops, &c.

4. The inside and outside blinds, gas fittings, gasaliers, pipes, meter, picture rods, iron safe in pantry, &c., as specified in an inventory, to be produced at the sale, shall be taken and paid for by the purchaser at a price to be named by the auctioneer at the time of sale, or at a valuation to be made by two persons, one to be named by the vendors and the other by the purchaser, or by an umpire to be appointed by the valuers; but if either the vendors or purchaser shall refuse or neglect to name a valuer, or to notify it in writing to the other party within seven days from the day of sale, or if the valuer named

Tenants' fixtures in a town house.

(*b*) For a valuable collection of the different customs which obtain in different parts of England, see Mr. Willis Bund's treatise on the Agricultural Holdings Acts. See also *infra*, tit. Leases.

VII. **Fixtures, Timber, Crops, &c.**

by either party shall refuse or neglect to act, then the decision and valuation shall be made by the valuer (if duly notified within such seven days) of the other party alone.

Fixtures, furniture, stock-in-trade, &c., or sale of a shop or factory as a going concern.

5. All the tenants' fixtures, fittings, furniture [machinery], implements, and utensils in and upon the premises offered for sale, and used or employed in the vendor's trade or business of a ———, and all the stock in trade and book or other debts belonging and owing to the vendor, and the benefit of all contracts and engagements relating to the said trade or business entered into between the vendor and other persons, shall be taken by the purchaser at a fair valuation, such valuation, &c. [*as in* 1 *or* 2], and the decision of the auctioneer [*or* of the said valuers or their umpire] as to what are tenants' fixtures or fittings shall be conclusive.

Fixtures in inventory to be taken at a valuation(*c*).

6. The purchaser shall pay for all the fixtures and things included in an inventory already made out and signed by the auctioneer, which may be seen at his office, according to a valuation to be made (at the expense of the vendor and purchaser in equal moieties) by two referees or their umpire in the usual way, the amount whereof shall be considered as part of the purchase-money.

Purchaser to declare his option to take the grass and crops.

7. The purchaser of each lot shall declare, by notice in writing to be delivered to the vendors' solicitors on or before the ——— day of June next, his option to take or refuse the grass and other growing crops at a valuation to be made by a referee or by two referees or their umpire to be chosen in the usual manner, at such time between the ——— of June and ——— of ——— following as the vendors shall appoint; and in default of the purchasers so declaring such option, the vendors shall be at liberty, at any time before the crops respectively shall be fit to get in, either to require the purchaser to purchase the same at a valuation, or to sell the same by auction or otherwise on the premises, for their own benefit, with the right of stacking in the stack-yard until the ——— day of ———.

(*c*) As to the purchaser's right to fixtures in the absence of express stipulation, see *ante*, p. 684.

It is very desirable to ascertain the articles in the way specified in the text, if it can conveniently be done, as the meaning and application of such expressions as "fixtures," "tenant's fixtures" are subjects of frequent dispute.

VII. Fixtures, Timber, Crops, &c.

8. The vendor shall be at liberty to gather and remove all crops which shall be on the land before the ——— day of ———; and the respective purchasers shall take all crops which shall be on the land on that day at a valuation to be made by two referees or their umpire, to be appointed in manner mentioned in the —th condition.

Crops not removed by vendor to be taken by purchaser at a valuation.

9. The vendors reserve to themselves the right to remove at any time before completion (doing no unnecessary damage), the summer houses, garden seats, and other effects not included in the sale, or to sell the same on the premises by auction.

Reservation of right to remove or sell fixtures, &c.

10. The vendors reserve the right of selling by auction upon the farms and lands in hand, the live and dead farming stock, &c., at any time within sixty days after the sale; also the right of using the barns and yards with stabling, &c., for ——— horses [and stalls for ——— head of cattle], for stacking and thrashing out the corn and crops, and carrying off or feeding the hay, fodder, &c., till the Lady-day following.

Reservation of right to hold auctions, thrash corn, &c., until a fixed date.

11. The minerals in, under, or upon the property offered for sale, are not included in the sale, and are, with all usual or legal powers for the getting and disposing of such minerals, reserved to the vendor, his heirs and assigns, but so that the property now offered for sale shall not, for the purpose of working the minerals, be opened on the surface; but the vendor, his heirs and assigns, shall be at liberty to work, get and dispose of the said minerals, as and when he or they shall think fit, through and under the property offered for sale, or any part thereof other than the surface, from and under adjoining property of the vendor situate on the east side of the present sale plan.

Reservation of right to work minerals, &c.

VIII. Insurance—Repairs—Expenses incurred by Vendor.

1. The purchaser shall be deemed to buy with full notice of the state and circumstances of the property as regards fire insurance, repairs, and other like matters.

Purchaser fixed with notice of state of property.

2. If the property should be destroyed or damaged by fire, either before or after the day fixed for the completion of the purchase, and while any insurance against fire subsists thereon

Purchaser to have benefit of existing insurance (*d*).

(*d*) See *ante*, p. 625.

VIII. Insurance, &c.

in favour of the vendors, the purchaser is to be entitled to the benefit of such insurance (or a proportionate part thereof if including other property), upon paying to the vendors the amount of the last premium paid thereon (or a like proportion thereof). The vendors, however, do not guarantee the existence or validity of any such insurance.

Purchaser to reimburse vendor for expenditure incurred before completion (*e*).

3. If before the completion of the purchase the vendor shall have expended any money in complying with any requirement enforceable against him, and made after the sale by the municipal corporation, local board of health, or other public authority of the borough [*or* district] of ———, in respect of the property, or of the paving or flagging of the roads, streets, or passages adjoining the same, the purchaser shall, on the completion of the purchase, repay to the vendor the amount so expended by him, and in case any such requirement shall not have been complied with before the completion of the purchase, the purchaser shall indemnify the vendor in respect thereof; but the vendor shall, upon receiving notice of any such requirement, inform the purchaser thereof, and give to him the option of complying therewith in lieu of the vendor so doing, and shall not expend any moneys for any of the purposes aforesaid, unless the purchaser shall request him so to do, or shall refuse or neglect to comply with such requirement.

IX. Easements — Reservations and Restrictions — Tenancies, Charges and Incumbrances—Apportionment.

Easements, &c., generally.

1. The property is believed and shall be taken to be correctly described as to quantity and otherwise, and is sold subject to all rights of way and water or other easements (if any) charged or subsisting thereon.

Easements, land tax, &c.

2. The property is sold subject to all such rights of way, water, light and air, and other easements over or affecting the same as now exist, and to land-tax and tithe rent-charge, and to such charges, payments, or liabilities of a local nature as affect the same or any part thereof; and the purchaser shall not be entitled to any compensation for or on account of any such matters.

(*e*) See *ante*, p. 647.

3. The property is sold subject to all chief, quit and other rents, rights of way and water and drainage, and other easements affecting the same, and to all liabilities to repair or contribute to the repair of roads, bridges, sewers, drains, fences, and other like matters, and other outgoings and incidents of tenure, and subject also to the existing tenancies and tenant rights. Easements, quit rents, &c.

4. The several lots are sold subject to all existing rights of way and drainage and other similar easements, and to all small quit-rents and other similar outgoings, if any, and also to all existing tenancies. The purchasers shall be deemed to have knowledge of the available means of access to the several lots, and shall make no requisitions or objections on the subject. Some of the lots are held by the tenant with adjoining land at an entire rent; the purchasers shall arrange for the apportionment of such rent. Easements, quit rents, &c., means of access, and apportionment of rent.

5. The property is sold subject to all existing public and private roads, ways, paths, and rights of way, and to such liability to contribute to the repair of occupation or other roads as may exist. Purchaser to take subject to rights of way, &c.

And also subject to a right of way of the width of ——— feet, for all purposes, to be reserved to the vendors, or as they shall direct, as marked out in the plan, and distinguished by the letters A and B at the extremities thereof. Right of way to be reserved to vendor.

And also with the benefit to the purchaser of a right of way for all purposes, as marked out in the plan, and distinguished by the letters B and D at the extremities thereof. Right of way to purchaser.

6. The several lots are sold subject to existing tenancies and to the claims of the tenants for compensation for acts of husbandry or otherwise, and to the payments mentioned in the particulars, and to the chief rents and quit-rents (if any) or other incidents of tenure, and also all rights of way, water, and other easements affecting the several lots, and subject to such liabilities to maintain fences and other liabilities of the like description as the premises may be subject to, and subject to such reservations (if any) as may have been made by act or award under which any part of the premises may have been enclosed. Copies of the leases or agreements under which the tenants hold can be seen in the sale room on the day of the sale, and the purchaser shall be deemed to have full notice of all the contents thereof. Agricultural tenancies. Reservations in award. Inspection of leases to tenants.

7. The easements to which lots 1 and 2 are expressed in the said will of ——— to be respectively subject are believed Easements presumed to be extinct.

IX. Easements, Reservations, Charges, &c.

to have been since extinguished, and for the purposes of this sale shall be taken to have absolutely and finally ceased. But the purchaser of lot 1, if that lot is sold separately from lot 2, shall have a right of drainage through lot 2 into ———, as specified in the particulars; and such right, together with proper remedies, if required, for securing the same, shall either be reserved on the sale of lot 2 or granted by the purchaser of lot 2 after the conveyance thereof to him, as the vendors shall direct.

Easements to be created.

Existing tenancy and easements.

8. The property is sold subject to the existing tenancy and to all easements, if any, affecting the same, whether mentioned in the particulars or not, and particularly to an agreement dated the ——— day of ———, 18—, and made between [A. B.], of the one part, and the vendors, of the other part, affecting certain windows of the ——— premises, for the use of which the vendor agreed to pay an annual rent of — per year if demanded, a copy of which agreement can be seen at the offices of the vendor's solicitors.

Leases and tenancies.

9. All counterparts or copies in the vendor's possession of leases, agreements, or notices relating to the tenancy or occupation of any of the premises by the vendor's tenants will be produced at the sale, and may be inspected at the said office of Messrs. ———, at any time within one week prior to the day of sale, between the hours of ten and four, and each purchaser shall be deemed to have full notice, at the time of purchasing, of the contents of such documents respectively.

Annuity.

10. The bulk of the property is subject to an annuity or yearly rent-charge of 500*l.* per annum, payable during the life of a lady now aged sixty-five years. The vendor will endeavour to obtain her concurrence in the conveyance, but should he be unable to do so (of which inability a statement in writing, signed by his solicitors, shall be sufficient evidence), the purchaser shall be satisfied with the investment of a portion of the purchase-money in the purchase, in the names of two trustees (one to be appointed by each party), of a government annuity of 500*l.*, or (at the vendor's option) of consols sufficient to produce that amount. The trust deed (if any) necessary for the above purpose shall be prepared by and at the expense of the vendor, the purchaser bearing the expense of the perusal and execution thereof on his part.

Indemnity against annuity.

11. The purchaser shall accept the vendor's bond (to be prepared by and at the expense of the vendor), in the penalty of 100*l.*, against a life annuity of 10*l.* affecting lot —, the same being also amply secured out of large estates belonging to the vendor, which fact, however, it shall not be incumbent on the vendor to prove.

Rent-charges and building covenants.

12. By the conveyances of the 2nd April, 18—, and 12th December, 18—, respectively, rent-charges of £———, £———, and £——— respectively, with usual powers of distress and entry for securing the same are limited to the Corporation of ———. The said conveyances of the 2nd April, 18—, and 12th December, 18—, also contain covenants on the part of the grantees relating to payment of the rent-charges, and to building on, and use of the premises comprised in the conveyances respectively, and other like matters. All these conveyances or copies thereof will be produced at the sale, and may be inspected at the aforesaid office of Messrs. ———, during the usual business hours, for a week before the day of sale, and the purchaser shall take, subject to and with notice of the said several rent-charges and covenants, and shall covenant in his conveyance to pay and perform the same respectively, and to indemnify the vendor therefrom, and the production of receipts for the last payments of the said respective rent-charges accrued previously to the completion of the purchase shall be conclusive evidence that all the said covenants have been performed up to the completion of the purchase.

Quit rents and incidents of tenure.

13. No objection or requisition shall be made on account of any quit or other rent now or heretofore payable to the lord or lords of the manor of ———, of which both lots are holden, and the sale of each lot shall be subject to all manorial rights and incidents of tenure.

Reservations, &c. in Inclosure Act.

14. All such parts of the property as have been awarded under any Inclosure Act will be sold, and shall be expressed to be conveyed subject to the exceptions, reservations, and provisions of the Act, and the obligations imposed by the award thereunder.

Repairs of fences, bridges, &c. (*e*).

15. The property is stated in the entry in the land re-

(*e*) For conditions as to the insertion in the conveyance of covenants and provisions imposing obligations and restrictions on the purchaser, see *post*, p. 828 *et seq.*

IX. Easements, Reservations, Charges, &c.

gistry, dated, &c., to be subject, with other hereditaments, to such liability for fencing, draining, and repair of bridges as then affected the same. The vendor believes that such liability is practically of no importance, no payment having been made or claimed, so far as he is aware, in respect of any of the matters aforesaid for some years past, and each purchaser shall take the property purchased by him subject to the said liability (if any) affecting the same, and shall make no requisition or objection, and shall ask for no information in respect of the grounds of the vendor's said belief, or of the said liability or otherwise in respect or by reason of any of the matters mentioned in this condition.

Repairs of church.

16. The property now offered for sale was with other property charged with the repairs of the chancel of the parish church of ———, in exoneration of any other hereditaments which might be chargeable therewith, and by an indenture dated the 27th day of August, 18—, and made between [*parties*], the said [*two of the parties*] respectively covenanted to pay in the proportions therein mentioned the expense of keeping in repair the chancel of the said church, and to keep the said [*third party*], his heirs and assigns, and the property now offered for sale indemnified therefrom. An indenture of the 15th day of May, 18— (being a conveyance of the remaining portion of the property now offered for sale), contains a covenant on the part of the grantor to keep the vendor, her heirs and assigns, indemnified against all proceedings on account of the repairs of the chancel of the said church. The purchaser shall be satisfied with the covenants so entered into for the repair of the chancel of the said church, and shall not require the property now offered for sale to be formally released from the repairs of the said chancel, nor require any other indemnity against the expense of such repairs.

Restrictive covenants as to building and trading.

17. The part coloured ——— on the said plan is subject to a restrictive covenant against building or carrying on of offensive trades, contained in a deed of conveyance dated, &c. As to the part coloured ——— on the said plan, the purchaser shall assume that the restrictive covenant against building contained in a deed of feoffment dated 22nd day of July, 18—, has been and is waived by a permission in writing dated 25th August, 18—, and signed by ———. The lot is sold subject to and with the benefit of such covenants and permission respectively, if and so far as the same

or any of them are still binding and effectual, and the purchaser shall not claim to be entitled to any compensation, abatement of purchase-money, or payment whatever in respect of such covenants and permission, or any of them, or in respect of anything therein contained respectively.

Restrictive covenants as to building, &c.

18. The deed of ——— August, 18—, contains certain covenants on the part of the vendor's testator relative to building and otherwise, and the deed of ——— December, 18—, also contains covenants relative to building and otherwise on the part of the vendor. These deeds will be produced at the sale, and may be previously inspected at the office of the vendor's solicitor. The purchaser shall be deemed to purchase the property subject to these covenants, and with full notice of all the contents of these deeds.

Succession duty (*f*).

19. The property is sold subject to the succession duty, which will become due and payable on the decease of the present tenant for life.

Apportionment of land tax, vendor not to be required to obtain.

20. The vendor shall not be required to obtain the apportionment of any land tax, or tithe rent-charge, or to obtain the legal apportionment by consent of tenants, or otherwise, of any rents referred to in the particulars as being apportioned.

Apportionment of tithe rent-charge.

21. The rent-charge in lieu of tithes, to which two or more lots are subject, shall be apportioned by and among the purchasers and (if any lot is unsold) the vendor, [in the manner mentioned in the particulars,] at the expense of the respective parties, in proportion to the respective amounts of the apportioned charges.

Apportionment of tithe rent-charge.

22. The apportionment of the commutation rent-charge in lieu of tithes (which is charged upon the whole of the property now sold) shall be effected by and at the expense of the respective purchasers, and the rent-charge and expenses shall be apportioned in proportion to the amounts of the respective purchase-moneys; and if any lot is unsold, the vendor shall, for the purpose of this condition, be considered as a purchaser for such sum as the same shall be valued at by the auctioneer.

(*f*) As to the liability in respect of succession duty in the absence of stipulation, see Dart, V. & P. 277; and see *Braybrooke* v. *Att.-Gen.*, 9 H. L. C. 150; *Le Marchant* v. *Commissioners of Inland Revenue*, 1 Ex. D. 185.

X. Compensation for Misdescription, &c.

No compensation.

1. If any error or misstatement in the particulars [or plan thereto annexed], or in these conditions shall be discovered, the same shall not annul the sale, nor shall any compensation be made by the vendors, or allowed to the purchaser in respect thereof.

Compensation to be settled by arbitration.

2. If any error or misstatement shall appear to have been made in the particulars [or plan thereto annexed], or these conditions, the sale shall not be annulled thereby, nor shall the purchaser be thereby discharged from his purchase, but a compensation shall be allowed or made to or by the purchaser, as the case may be, and the amount of such compensation shall be settled by arbitration in the usual manner.

No compensation as to quantities; compensation for other matters to be settled by auctioneer.

3. All the measurements and quantities of the property are believed and shall be deemed to be correct, and shall not be the subject of compensation if incorrect. Any misstatement or any error or omission in other respects, which may be discovered in the particulars affecting any lot, shall not annul the sale, but if any such shall be pointed out before completion, compensation shall be paid or allowed on account thereof to the vendor or the purchaser, as the case may be and require, and the amount of such compensation, in case of dispute, shall be settled by the auctioneers. No compensation shall be allowed or paid for any misstatement, error or omission, unless the same shall be discovered and compensation therefor shall be demanded in writing before the completion of the purchase (*g*).

No compensation as to quantities; compensation for other matters to be settled by arbitration.

4. The quantities of land stated in the particulars having been ascertained by an eminent surveyor about the year 18— must be accepted by the purchaser as correct, and if any error or omission in the particulars or in the description of the property in these conditions, other than an error as to quantity, shall be discovered the same shall not annul the sale, but compensation shall be allowed by the vendor or purchaser in respect thereof, and such compensation, if the parties differ, shall be settled by two arbitrators or their umpire, appointed according to the provisions of the Common Law Procedure Act, 1854, or any subsisting statutory modification thereof.

(*g*) As to the last sentence of this condition, see *Bos* v. *Helsham*, L. R., 2 Ex. 72; and *ante*, p. 708 *et seq.*

X. Compensation.

5. In case of the death of the present incumbent of the said rectory or benefice, or of his cession, deprivation or relinquishment thereof, before the day fixed for the completion of the purchase, the vendors will use their best endeavours to procure such person to be presented thereto as the purchaser, he having accepted the title, shall nominate. And if such presentation shall devolve on the Crown in consequence of the present or any succeeding incumbent being promoted to a bishopric, either before or after the day fixed for completion of the purchase, the sale of the advowson shall not be affected thereby, nor shall the purchaser be entitled to any deduction from the purchase-money or other compensation in respect thereof. The age of the present incumbent, as stated in the particulars, is correct to the best of the vendors' information and belief, and shall be assumed to be correct without question.

As to presentation to benefice.

Age of incumbent to be assumed to be correctly stated.

6. The purchaser shall not be entitled to any abatement of the purchase-money or indemnity on account of a quit-rent of £———, mentioned in a conveyance dated in ——— as then payable out of the premises therein comprised, no such rent being known to be now payable.

Quit-rent.

XI. Execution, Form, and Contents of Conveyance—Apportionment of Rents of Leaseholds.

1. The vendors being [executors and] trustees [*or* mortgagees] shall be required to give only the statutory covenant against incumbrances implied by reason of their being expressed to convey as [personal representatives and] trustees [*or* mortgagees].

Trustees and mortgagees.

2. The vendors are trustees selling under a power of sale, with the consent of a beneficiary who is abroad, and shall be required only, &c. [*ut ante*]. Such consent shall be sufficiently evidenced by a letter signed by the beneficiary authorising the trustees to effect a sale. The genuineness of the letter and signature shall be deemed to be sufficiently authenticated by a declaration to be made by a person acquainted with the handwriting of the beneficiary.

Trustees for sale where consenting beneficiary is abroad.

3. The vendor is selling as tenant for life, under the powers of the Settled Land Act, 1882, and he shall not be required to enter into any covenants for title other than such

Tenant for life selling under Settled Land Acts.

XI. Conveyance—Apportionment of Rents.

as are implied by his conveying as beneficial owner, subject to a proviso that as regards the reversion or remainder expectant on his life estate, and the title to and further assurance of the property after his death, such implied covenants shall not extend to the acts or defaults of any person other than himself and his heirs and persons claiming or to claim under or in trust for him or them. The trustees of the said settlement will concur in the conveyance, but only for the purpose of [testifying their consent to the sale and (*h*)] acknowledging the receipt of the purchase-money and of the amount of the said valuation, and their concurrence shall not be required for any other purpose.

Mortgagee not to be required to release by a separate instrument.

4. The property offered for sale is now, with other premises, subject to a mortgage to secure £——— and interest. The purchase-money will be received by the mortgagee in part payment of the mortgage debt. The mortgagee will join in the conveyance to the purchaser, and the vendor shall not be required to procure a reconveyance or release by a separate instrument.

Mortgagee.

5. Upon payment of the remainder of the purchase-money the vendor and her trustee and her mortgagee, and all other necessary parties (if any), will execute a proper assurance of the premises to the purchaser, but such assurance, and every other assurance and act which shall be required by the purchaser for getting in, surrendering or releasing any outstanding estate, right, title or interest, or for completing or perfecting the vendor's title, or for any other purpose, shall be prepared, made and done by and at the expense of the purchaser, and every such assurance shall be tendered or left by him not less than ten days before the ——— day of ——— next, at the office aforesaid, for execution by the vendor and other necessary parties (if any), and the expense of the perusal on behalf of and execution by all parties (other than the vendor), and her trustee and mortgagee, of all such assurances, as aforesaid, shall be borne by the purchaser. The existing mortgage will be paid off out of the purchase-money, and the mortgagee who will concur in the

(*h*) The words in brackets will be required only where the property offered for sale includes the principal mansion house and demesnes, &c. See tit. AGREEMENTS, Vol. I., p. 411, note (*a*).

conveyance, and the purchaser shall not require any reconveyance by separate deed.

Several sets of mortgagees concurring in sale.

6. Such parts of the property offered for sale as are included in lots 1 and 2 respectively are offered for sale by mortgagees, and the parts included in lots 3 and 4 by other mortgagees, who concur in selling, under their respective powers of sale, for the benefit of the property which has for a long time past been held as one estate, and no objection shall be raised on the ground of such concurrence. If the whole of the property shall be sold in one lot, then, but not otherwise, the purchase-money shall be apportioned by the auctioneer in respect of the parts sold by the respective mortgagees, and no objection shall be made to such apportionment.

Mortgagees by subdemise.

7. The vendors are mortgagees of the properties comprised in the several lots, the same having been subdemised to them by six separate mortgages for the residues of the terms respectively granted by the leases mentioned in the particulars, except the last day of each term. Each mortgage contains a provision that after a sale the mortgagor shall stand possessed of the last day of the term granted by the original lease upon trust for the purchaser on such sale, and to assign and dispose of the same as such purchaser shall direct. Each purchaser at this sale shall have an assignment from the vendors for the mortgage term only, and is not to require them to show in whom the principal term is now vested. The assignment or other assurance to a purchaser shall be prepared by him and at his own expense, and the engrossment thereof shall be delivered at the office of the solicitors of the vendors four days before the ——— day of ———, 18—, for execution by the vendors, and the draft of such assignment or other assurance shall be left at the office of such solicitors, for perusal and approval on behalf of the vendors, at least seven days before the delivery of the engrossment, but the vendors shall not be required to procure the concurrence of the mortgagor or other parties entitled to or interested in the equity of redemption.

Equitable mortgagee not to be required to concur.

8. The agreement for the said lease has been deposited by way of equitable mortgage: there has been no written instrument of deposit, and the equitable mortgagees shall not be required to do more than give a letter to each purchaser stating that they have been paid off.

XI. **Conveyance — Apportionment of Rents.**

Equitable mortgagees and bankruptcy trustee.

9. The vendors are equitable mortgagees selling with the concurrence of the trustee of the property of [A. B.], a bankrupt. Upon payment at the time and place above specified of the residue of the purchase-money, and in the case of lot — upon payment also of the value of the fixtures, as above mentioned, the said trustee, by direction of the vendors, will convey the freehold and appoint the copyhold portion of the property. The assurances shall be prepared by and at the expense of the respective purchasers, and shall be left for execution at the office aforesaid, not less than ten days before the said ——— day of ———, 18—. The purchasers shall not be entitled to any covenant for title from the vendors, or from the said trustee, other than the implied statutory covenant that they have respectively done no act to incumber.

Executors concur to release charge.

10. The executors of the said late [*testator*] will join in the conveyance to release the aforesaid charge in respect of redeemed land tax, and will receive a proper proportion of the purchase-money, such proportion to be settled by the auctioneers.

Execution by power of attorney.

11. The vendor, being abroad, has executed a power of attorney, authorizing a sale of the premises mentioned in the particulars annexed hereto. No objection shall be raised by any purchaser as to the right of the attorney or attorneys to sell the said premises, or to anything contained in the said power of attorney, and the conveyance or assignment to the purchaser shall be executed by the attorney or attorneys therein named, and no objection shall be taken to such execution, nor shall any evidence be required that the vendor is alive on the date of such execution.

Form of conveyance of leaseholds sold in lots: purchaser of largest lot to take assignment and give underleases to other purchasers.

12. Lots ———, being held under one lease at an entire rent, the purchaser of the largest part thereof in value, who is in this stipulation referred to as the lessor, shall take an assignment of the said lease, and shall be entitled to possession of all deeds relating to the common title, and shall execute to the other purchasers underleases for the unexpired residue of the term granted by the original lease, wanting three days, of their respective lots, at the apportioned rents mentioned in the particulars. Such underleases shall contain all necessary covenants for indemnifying the several purchasers in respect of the performance of the covenants or payment of apportioned parts of the rent and of the sums, if any, advanced and paid for insurance from fire, in respect of any

other lots than their own, and for securing the payment of such apportioned parts of the rent and of such advanced sums, if any, and performance of the covenants by the several purchasers in respect of their own lots; and each underlease, and a counterpart thereof for delivery to the lessor, shall be prepared, engrossed, and stamped by, and in all respects at the expense of the purchaser who is to be lessee thereunder, and shall be executed by the lessor and lessee respectively, and shall contain all proper covenants by them, having regard to the form of the principal lease. And the lessor shall give to the underlessee an acknowledgment of his right to production and delivery of copies of the principal lease, and of any documents of title relating thereto retained by the lessor, and also an undertaking for safe custody thereof. And if any one of the said five lots remains unsold the vendors may, at their option, stand for the purposes of this condition in the place of the purchaser of the largest part in value.

Form of conveyance of leaseholds sold in lots: purchasers to take assignments and give mutual powers of distress, &c.

13. Lots 1 and 2 being held under one lease at an entire rent, the purchasers of those lots shall take assignments of their respective lots at the apportioned rent mentioned in the particulars, and shall thereby enter into mutual covenants for payment of their respective proportions of the rent and performance of the covenants and conditions of the original lease, and shall give to each other mutual powers of distress and entry as an indemnity against such respective proportions of rent and breach of such covenants and conditions. If either lot shall remain unsold the vendor shall stand in the place of the purchaser of the unsold lot for the purposes of this condition.

Form of conveyance of leaseholds; mode to be settled by vendor's counsel.

14. As all the premises to be sold are held under one lease at one entire rent, the rent shall be apportioned among the purchasers in the shares mentioned in the particulars, and the mutual indemnities and securities of the several purchasers and the vendor in respect of the original rent and covenants, whether by an assignment to the purchaser to the largest amount or otherwise, or to a trustee, and underleases to the other purchasers, or by underleases only, and with or without counterparts or other deeds of covenant or indemnity, shall in all respects be effected according to the advice of counsel to be appointed by the vendor on behalf of all parties, who is to draw the several deeds; and the expense of preparing all necessary deeds shall (whether all

XI. **Conveyance—Apportionment of Rents.** the lots are sold or not) be borne by the purchaser or by the respective purchasers in proportion to the amounts of their respective purchase-moneys.

Covenants not to carry on business so as to inconvenience adjoining occupiers.

15. The conveyance to the purchaser shall contain a covenant by him, for himself, his heirs, executors, administrators, and assigns, that he or any person or persons claiming under him will not use, or permit or suffer to be used on the property conveyed any engine or shafting or machinery so or in such manner as to cause or occasion any noise or vibration which shall be audible or perceptible on any part of the adjoining premises No. —, ——— Street (now belonging to the vendors), and will not place, or permit or suffer to be placed, against or within ten feet of the party wall between the said property and the said adjoining premises, any boiler or any flue connected with a furnace, or any steam-engine or gas-engine or other engine of the like nature, or any shafting or machinery connected with any such engine, and will not carry on, or permit or suffer to be carried on, upon the said property any noisy, noisome, or offensive trade or business, or any act that shall in anywise prejudice or be an annoyance to the said adjoining premises or the owners or occupiers thereof for the time being, and will not execute any deed relating to the said property unless the same contains a reference to such covenant.

Building conditions.

16. Every purchaser shall, within one month after being let into possession of the plot purchased by him, make and afterwards maintain a sufficient boundary fence to his plot, and also on the remaining side of his plot within the

Fences.

boundary, such fences to be not less than four feet six inches or more than six feet in height; in case any such fence shall not be duly made and maintained, the owner or owners or either of them for the time being of the land immediately adjoining that side of the plot in respect of which such default shall have happened may enter upon such plot and make and repair such fence and recover the expenses thereby incurred from the said defaulter. In case of dispute the opinion of the vendor's surveyor as to the sufficiency of any such fence

Houses.

shall be decisive. No house shall be erected which shall be of less value than £——— for a detached house, or £——— for a pair of houses. The value of a house shall be taken by its first costs in materials and cost of labour and construction only. Every house to be erected upon any portion of the

land shall be used or occupied as a private dwelling-house only, and no other erection shall be built upon either plot, except outbuildings or offices to such dwelling-houses, without the consent in writing of the vendor, his heirs or assigns. The conveyance to each purchaser at the present sale shall contain covenants by the purchaser to observe the stipulations contained in this condition, but no covenants shall be personally binding on any purchaser except during the time of his sole or joint seisin of the land to which the covenants relate.

Building conditions.

17. The conveyances to the respective purchasers are to contain covenants by them respectively that no house of less value at prime cost than £——— shall be erected on their respective lots; and (as to the conveyance of lot 2) that no building of any kind shall be placed on any portion of lot 2 within ——— feet of the road leading to ———; and as to all the lots that the respective purchasers, or any person claiming under them respectively, will not execute any deed relating to the respective lots, unless the same shall contain a reference to such covenants: but no purchaser of any lot sold at this sale shall be entitled to inquire whether this present condition has been complied with, or to delay completion of his purchase on the ground that any other lot or lots remain unsold, or that the sale thereof has not been completed.

Fences.

18. Where the property comprised in any lot or lots is not sufficiently or at all fenced off or divided from the property in any other lot or lots, the expense of making all necessary fences shall be borne by the respective purchasers of the several lots in respect whereof such fences shall be required, in equal shares. And the vendor shall, in respect of any unsold lot or lots, stand in the position of a purchaser thereof.

Roads.

19. Every purchaser shall within ——— calendar months after the day of sale, at his own expense, with proper materials and in a workmanlike manner, make and form into a road fit for carts, waggons and carriages, such part or parts of the lot or lots purchased by him, as is or are in the sale plan delineated as part or parts of a projected street or projected streets, and shall thereafter, until the same shall be adopted as a public highway, at his own expense, repair and maintain the same with proper materials and in good condition, so as to be fit for use as aforesaid. And every person passing to

XI. Conveyance—Apportionment of Rents.

or from any of the lots or any part thereof respectively, shall at all times after the day of the sale have the right, with or without carts, waggons, carriages, horses or other animals, to pass and repass over all the said projected streets or the sites thereof respectively, and the several conveyances shall be made subject to the liabilities and rights created by or mentioned in this condition. But no purchaser shall require the production of, or investigate or make any objection or requisition in respect of the title to any part of any projected street, except such as is comprised in his own lot or lots; and the vendors shall not be bound or concerned to enforce any such liabilities or rights as aforesaid, further or otherwise than by requiring every such conveyance to be made subject as aforesaid. If any of the lots be not sold at this sale the vendors shall not, for the purposes of this condition, stand in the place of a purchaser of such lot or lots, so as to be bound to make or maintain part of any such projected street or streets as aforesaid, but the purchasers of the lots sold shall have the same rights of passage over the sites of such projected streets being unsold, as they would have had if such sites had been sold.

Roads.

20. The respective purchasers of lots 1, 2 and 3 are to covenant in their conveyances to make the road referred to in the particulars of those lots respectively, but no purchaser of any of those lots shall be entitled to defer completion of his purchase until the sales of the others of such lots are completed.

Form of conveyance, and indemnity to vendor against rents, &c., in underlease.

21. In 18— a lease was granted by the testatrix at a peppercorn rent for ninety-nine years, determinable on lives (of which one is now subsisting) of property near B———— parish church. In 18— an underlease was granted of the premises comprised in the above lease, and of other premises to which, under a codicil to the testatrix's will, the lessor had become entitled rent-free for a like term. The underlease was for a term of eighty-five and a quarter years from Lady Day, 18—, determinable on the dropping of the said subsisting life, and reserved a rent of 90*l.* To this rent the subsisting life (a lady who is believed and shall be assumed to be aged seventy-two years) is now entitled. The freehold reversion expectant on the original term will be included in the sale, and the purchaser shall also take an assignment of the underleases, subject to the payment of the

XI. Conveyance—Apportionment of Rents.

said yearly rent of 90*l.*, as from the said ——— day of ——— next, during the continuance thereof, and the vendor shall be indemnified therefrom by the purchaser's covenant to be contained in the conveyance or assignment, or, at the option of the vendor, in a separate deed to be prepared by and at the expense of the vendor, and to be executed at the same time.

Indemnity to vendor against rents, &c. in lease.

22. The purchaser shall indemnify the vendors and the estate of the testator against the several rents, covenants, agreements and obligations, to which the leasehold premises respectively are subject, and in case the vendors shall deem it expedient that such indemnity be provided for by the execution and delivery of counterparts of the assignments, or any of them, the purchaser shall, at his own expense, execute and deliver such counterparts, but the cost of ingrossing and stamping such counterparts will be borne by the vendors.

Covenant to allow adjoining occupier to enjoy rights.

23. The property is sold subject to the right of the owner, her heirs, and assigns, of the adjoining messuage and premises, No. —, ——— Street, at all times hereafter, to the full and free use and enjoyment of the rain-water gutters and pipes from the eaves at the back of the said messuage and premises, and of all the drainage and water supply leading from and to the lavatory in the said last-named messuage to the messuage and premises now offered for sale, with the full and free right to enter on the said messuage and premises now offered for sale, for the purpose of opening the ground, drains, and pipes, and repairing such drains, pipes, drainage, and water supply, when and as often as shall be required by such owner, her heirs, and assigns. The purchaser shall in his conveyance covenant with the present owner to observe the stipulations mentioned in this condition relating to the said drainage, water supply, and other matters.

XII. Custody of Deeds and Documents of Title.

Custody of muniments of title where some are retained by the vendor.

1. Such of the deeds and muniments of title in the vendor's possession as relate exclusively to the property sold, will be delivered to the purchaser, but the vendor will retain all other deeds and other documents, and will give to the purchaser the proper statutory acknowledgment of the right to production and delivery of copies, and undertaking for safe custody

XII. Custody of Title Deeds.

thereof, any such acknowledgment and undertaking to be prepared by and at the expense of the purchaser.

Another form, on sale of property in one lot.

2. Deeds and documents of title relating to the premises sold, and also to other property or matters shall be retained by the vendor or parties or party entitled thereto or holding the same, but such usual and proper acknowledgment or undertaking relating thereto, limited to the time of holding the same, shall be given as can be procured; but documents of title relating exclusively to the premises sold, shall, if in the vendor's possession, be delivered to the purchaser thereof. Every acknowledgment or undertaking hereunder shall be prepared by and at the expense of the purchaser requiring the same, but shall be perused and executed by the party giving the same, at his own expense, and the purchaser shall not object to the absence of any sufficient covenant, acknowledgment or undertaking, or to any existing covenant, acknowledgment or undertaking with reference to such documents.

The same, on sale of property in several lots.

3. Deeds and documents of title relating to the premises sold, and also to other property or matters, shall be retained by the vendor or parties or party entitled thereto or holding the same, but such usual and proper acknowledgment or undertaking relating thereto, limited to the time of holding the same, shall be given as can be procured; but documents of title relating exclusively to the premises sold shall, if in the vendor's possession and affecting one lot only, be delivered to the purchaser of such lot, but if affecting both lots shall be delivered to the purchaser of the premises affected thereby which shall fetch the largest price at the present or any future sale, who shall be bound to give the usual and proper acknowledgment and undertaking relating thereto to the purchaser of the other lot to which such documents relate; but the said documents shall be retained by the vendor or party or parties entitled thereto or holding the same without acknowledgment or undertaking, until both the lots to which they relate have been sold; and the purchase shall not be delayed on account of anything under this condition. Every acknowledgment or undertaking hereunder shall be prepared by and at the expense of the purchaser requiring the same, but shall be perused and executed by the party giving the same at his own expense; and no purchaser shall object to the absence of any sufficient covenant, acknowledg-

ment or undertaking, or to any existing covenant, acknowledgment or undertaking with reference to such documents. XII. Custody of Title Deeds.

4. The mortgage deed under the power of sale [implied] in which the property is offered for sale, comprises other land forming part of the estate, which other land is not now offered for sale. This deed will be retained by the vendor until the whole of his mortgage debt is discharged, when it will be handed over to the purchaser at the present sale, who shall in the meantime be entitled, at his own expense, to production of and copies of such mortgage deed, but not to any covenant for, or any acknowledgment of, the right of the purchaser to production of the deed, nor any undertaking for safe custody thereof. Custody of mortgage deed until the debt is paid off.

5. The purchaser of the largest lot (*i*) shall, after the sale of all the lots, or of all the lots to which any set of documents relate as the case may happen, be entitled to the possession of such documents in the possession of the vendors as relate to any other lot as well as the lot or lots purchased by that purchaser; but in respect of documents delivered to him which relate to the lot or lots of any other purchasers or purchaser shall give to him, if he shall so require, the proper statutory acknowledgment of his right to production and to delivery of copies thereof, and also the proper statutory undertaking for safe custody thereof. If any lot be not sold the vendors may, until sale thereof, retain all documents relating thereto, giving to any purchaser who may so require the before-mentioned statutory acknowledgment, but not the undertaking, and every acknowledgment or undertaking given under this condition is to be prepared and approved on behalf of all parties thereto at the expense of the person to whom it is given. Custody of deeds, where handed over to purchaser of the largest lot.

6. The said lease and the assignments thereof shall be delivered to the purchaser of the largest lot in value (and for this purpose the purchaser of several lots for the largest aggregate amount shall be deemed to be the purchaser of Custody of lease, &c., when handed over to largest purchaser in value.

(*i*) The term "largest lot" means the largest lot in superficial area; in the absence of stipulation the purchaser whose purchase-money is of the largest amount is entitled to the deeds: *Griffiths* v. *Hatchard*, 1 K. & J. 17. Under a condition such as that in the text, the purchaser of the largest lot is entitled to the deeds as against the purchaser of several lots of a greater aggregate area: *Scott* v. *Jackman*, 21 Beav. 110.

XII. Custody of Title Deeds.

the largest lot in value), who shall give to the other purchaser or purchasers, if he or they shall so require, the usual acknowledgments and undertakings as to production and safe custody thereof; and if there shall be two or more such purchasers as aforesaid whose purchase-moneys shall be of equal amount, then the purchaser of the lot first mentioned in the particulars shall be entitled to delivery to him of the deeds, and shall give, if required, such acknowledgments and undertakings as aforesaid (*k*); and if any lot be not sold, &c. [*continue as in form* 5].

Condition negativing purchaser's right to production, &c.

7. No purchaser shall be entitled to the possession or production, or to any covenant, acknowledgment, or undertaking for the production or furnishing copies or safe custody of any will or other muniment of title which is on record, or of any muniment of title not in the vendors' possession, of which an attested or other verified copy can be procured by and at the expense of the purchaser, or to any acknowledgment or undertaking in respect of any such will or muniment.

Counterparts of leases only to be delivered to purchasers.

8. Each purchaser of a lot will have delivered to him the counterpart of the lease under which such lot is at present held. Subject to this condition, the vendors shall retain the muniments of title, and the purchasers of the respective lots shall be entitled at their own expense to an acknowledgment of their right to the production of such muniments, but not to any undertaking for safe custody thereof.

Retention of settlement by trustees.

9. The vendors reserve the right of retaining in their possession the settlement of which they are trustees, and any other documents in their possession or power relating to their trust, and will in that case give to the purchaser a statutory acknowledgment of his right to the production of the documents so retained, and to delivery of copies thereof, but not any undertaking or covenant for safe custody thereof.

Purchaser to enter into substituted covenants with owners of other property for production of deeds delivered to him.

10. Such deeds as the vendors are now under a covenant or obligation to produce to the owner or owners of other property will, on the sale of all the vendors' property therein comprised, if such covenant is made determinable upon the vendors procuring, or such owner or owners will accept a substituted covenant, be handed over to the purchaser of lot 2, and such purchaser shall give to such owner or owners

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(*k*) When the largest purchaser in value is to have the deeds, the contingency should generally be provided for.

XII. Custody of Title Deeds.

the usual acknowledgment of right to production and undertaking for safe custody of the said deeds, or if he or they shall so require shall enter into a covenant with him or them similar to the covenant under which the vendors are now liable to produce such deeds, and the purchaser shall, on the request of the vendors, allow notice of such acknowledgment and undertaking, or covenant, as the case may be, by the purchaser to appear upon his conveyance and upon such deeds; but if such covenant is not made so determinable, and such owner or owners will not accept such substituted acknowledgment and undertaking, or covenant, such deeds shall be handed over to the purchaser of lot 2 as aforesaid, and such purchaser shall enter into a covenant with the vendors to carry out the vendors' covenant to produce and furnish copies and extracts, or as the case may be, and shall indemnify the vendors against all liability under the first-mentioned covenant. All deeds and things necessary to carry out this condition as to deeds which the vendors are now under a covenant to produce shall be prepared, perused, made, done, and executed, by and at the expense of the purchaser, save only as to the expense of the perusal and execution by or on behalf of the vendors.

DISCLAIMER.

PRELIMINARY DISSERTATION.

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1. Of Disclaimers generally.

Any estate may be disclaimed.

When an estate is conveyed or given by will to one or more persons, he or they may by deed disclaim the conveyance or devise, provided no act has been done to show an assent on his or their part. In the case of two or more persons, provided they are joint tenants, the estate will entirely vest in those who have not disclaimed. But if all the grantees or devisees disclaim, then, as well as when a single grantee or devisee disclaims, the estate will descend to, or vest in, the heir of the grantor or devisor. See *Re Gordon*, 6 Ch. D. 531. And in case there are trusts created by the grant or devise, the Court will enforce the execution of the trusts.

Law does not compel anyone to take estate.

In *Townson* v. *Tickell*, 3 B. & Al. 36, *Abbott*, C. J., said, "The law certainly is not so absurd as to force a man to take an estate against his will. *Primâ facie*, every estate, whether given by will or otherwise, is supposed to be beneficial to the party to whom it is so given. Of that, however, he is the best judge; and if it turn out that the party to whom the gift is made does not consider it beneficial, the law will certainly, by some mode or other, allow him to renounce or refuse the gift." See also *Begbie* v. *Crook*, 2 Scott, 128; *Robinson* v. *Pitt*, 3 P. W. 251; *Moyle* v. *Moyle*, 2 Russ. & My. 715; *Lowry* v. *Fulton*, 9 Sim. 123. Where two distinct

Of Disclaimers generally.

legacies are given by the same will, one being beneficial and the other onerous, the legatee may take the one and disclaim the other: *Warren* v. *Randall*, 1 J. & H. 1; *Andrew* v. *Trinity College*, 9 Ves. 525; but if onerous and beneficial properties are included in the same gift, the legatee must take all or none, unless the will indicates the testator's intention to have been otherwise: *Green* v. *Britten*, 42 L. J., Ch. 187; *Guthrie* v. *Walrond*, 22 Ch. D. 573.

Mode of disclaimer.

In *Crewe* v. *Dicken*, 4 Ves. 97, an estate was conveyed to three persons, their heirs and assigns, in trust to sell, with a proviso that the receipts of those three persons should be a sufficient discharge to the purchasers. One of the trustees died; another, refusing to act, conveyed his interest to the remaining trustee, who sold the estate. The purchaser refused to take the title, unless the trustee who had conveyed his interest would join in the receipt for the purchase-money. Lord *Rosslyn* said he must allow the objection; if the trustee had renounced, he might dissent; for then the whole estate would have been in the remaining trustee. But according to the way they had managed it, he had accepted the trust by conveying the estate. However, in *Nicloson* v. *Wordsworth*, 2 Swans. 365, Lord *Eldon* expressed his opinion that if a person, who is appointed co-trustee by any instrument, execute no other act than a conveyance to his co-trustees, where the meaning of that conveyance is disclaimer, the Court ought to regard the instrument as an effectual disclaimer. See *Urch* v. *Walker*, 3 Myl. & Cr. 702; *Sharp* v. *Sharp*, 2 B. & A. 405.

Disclaimer by parol.

It would seem that an effectual disclaimer may be made by parol. See *Townson* v. *Tickell*, 3 B. & Al. 31. See also *Bingham* v. *Lord Clanmorris*, 2 Moll. 253; *Re Gordon*, 6 Ch. D. 531. At all events it ought to be unequivocal: *Doe* d. *Smith* v. *Smith*, 6 B. & C. 112. There may be a disclaimer even by conduct; as where a party named executor and trustee under a will, did not formally renounce probate until after the death of the acting executrix, and never formally disclaimed the devise, but pur-

Of Disclaimers generally.

chased a part of the real estate, and took the conveyance from the widow, who was devisee for life, and the heir, upon whom the estate would have devolved upon a disclaimer by the trustee: *Stacey* v. *Elph*, 1 Myl. & K. 195. *Leach*, V.-C., however, in that case expressed his opinion that "it is most prudent that a deed of disclaimer should be executed by a person named trustee, because such deed is clear evidence of the disclaimer, and admits of no ambiguity." See also *Re Ellison's Trust*, 2 Jur., N. S. 253. See some old authorities, cited in a note by the reporter to the case of *Small* v. *Marwood*, 4 Man. & R. 190; *S. C.*, 9 B. & Cr. 308, for the purpose of showing, that though copyholds and other chattel estates may be disclaimed by parol, a deed is requisite to the disclaimer of a conveyance or devise of a freehold estate; but they appear to be overruled by later authority. See *Thomson* v. *Leach*, 2 Vent. 108; *Smith* v. *Wheeler*, 1 Vent. 128; *Rex* v. *Wilson*, 10 B. & Cr. 80.

Disclaimer by trustee.

A person who wishes to renounce the administration of the trust ought to execute a disclaimer with as little delay as possible, but there is no absolute rule that he must do so within any particular time: Lewin on Trusts, p. 181. See also *Doe* v. *Harris*, 16 M. & W. 517; *Paddon* v. *Richardson*, 7 De G., M. & G. 563; *Noble* v. *Maymott*, 14 Beav. 471. He is entitled to take the opinion of counsel to guide him to a decision, whether or not he will disclaim: *Re Tryon*, 7 Beav. 496 (*a*).

No disclaimer after act of ownership.

A disclaimer executed after any act of ownership is wholly inoperative: *Bence* v. *Gilpin*, L. R., 3 Ex. 76. See also *Mucklow* v. *Fuller*, Jar. 198. But an acceptance by an executor of personalty is not incompatible with his disclaiming trusts of realty devised by the same will: *Lord Wellesley* v. *Withers*, 4 E. & B. 750.

Disclaimer at bar.

A trust may be disclaimed at the bar of the Court,

(*a*) It would seem that, on the disclaimer of a trustee of copyholds, and the appointment of a new trustee in his place, the lord is not entitled to a double fine: see *Paterson* v. *Paterson*, L. R., 2 Eq. 31.

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or by statement of defence: *Foster* v. *Dunbar*, 8 W. R. 646. A person named trustee in a deed, who declines to act, and is unnecessarily made a party, can only have his costs as between party and party: *Norway* v. *Norway*, 2 My. & K. 278.

Costs of trustee disclaiming.

A trustee and executor who deals with the property after a formal disclaimer, with the assent of the other executor, is not chargeable as trustee or executor: *Dove* v. *Everard*, 1 Russ. & M. 231. To prevent trustees appointed by deed from disclaiming, which might in some instances be productive of inconvenience, and even defeat the object of the trust, they should be made to execute the deed.

Effect of disclaimer.

In *Adams* v. *Taunton*, 5 Madd. 435, it was held that a trustee of real estate for sale, who has renounced his trust, is not a necessary party in a conveyance to a purchaser; nor is it necessary that he should join in a receipt for the purchase-money; for a devise to A., B., and C., upon trust, being a good devise to such as accept the trust, it follows that, by "the receipt of the trustees" is to be intended, the receipt of those who accept the trust. See *Bonifaut* v. *Greenfield*, Cr. El. 80; *Small* v. *Marwood*, 4 Man. & R. 181; *Cooke* v. *Crawford*, 13 Sim. 96 (*b*).

Whether heir of trustee can disclaim.

A doubt has occurred, in practice, whether the heir of a devisee or releasee, who has not assented to the devise or release, can disclaim. Of course, strictly speaking, the heir is incapable of *disclaiming;* for if the estate was in his ancestor, it must descend upon him, and no one can reject that which the law casts upon him; but the question may be raised whether the Court would force an inheritance upon an heir insisting and establishing that his ancestor had never agreed to take the estate, or rather not having the contrary proved against him. It seems to have been assumed in the case of *Goodson* v. *Ellisson*, 3 Russ. 583, that the heir of a trustee must show some act of renunciation by his ancestor to discharge himself from liability to execute a conveyance at the direction of the *cestui que trust.* If the heir takes

(*b*) See note (*a*), *supra*, p. 838.

Of Disclaimers generally.

as special occupant it would seem that he may disclaim the estate: *Creagh* v. *Blood*, 3 Jo. & L. 170.

Disclaimer by married women.

It was formerly doubted whether a *feme covert* could disclaim under the Fines and Recoveries Act (3 & 4 Will. 4, c. 74, s. 77); but now by the Real Property Amendment Act, 1845 (8 & 9 Vict. c. 106), s. 7, married women are enabled to disclaim estates or interests in lands in England by *deed* executed with their husband's concurrence, and duly acknowledged (*c*). See *ante*, Vol. I., tit. ACKNOWLEDGMENT, p. 210.

Disclaimer of power.

The Conveyancing Act, 1882, provides as follows:—

Conv. Act, 1882.

Sect. 6.—"(1) A person to whom any power, whether coupled with an interest or not, is given, may, by deed, disclaim the power; and, after disclaimer, shall not be capable of exercising or joining in the exercise of the power.

"(2) On such disclaimer, the power may be exercised by the other or others, or the survivors or survivor of the others, of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power.

"(3) This section applies to powers created by instruments coming into operation either before or after the commencement of this Act."

As to release of powers by trustees, see sect. 52 of the Conveyancing and Law of Property Act, 1881, *post*, tit. RELEASE. It has been held that when a power is given to trustees, coupled with a duty, to be used not for their own benefit but to enable them to modify the dispositions of the property, such power cannot be destroyed: *Re Eyre*, W. N. 1883, p. 153 (*d*).

Stamps.

Stamps.]—A disclaimer by deed will require an ordinary deed stamp of 10*s*.

(*c*) This enactment was intended to supply the omission of the word "disclaim" in the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), s. 77; the corresponding Irish Act (4 & 5 Will. 4, c. 92), s. 98, contained the word "disclaim."

(*d*) As to disclaimer of property given by a testator upon trust for charitable purposes, see *New* v. *Bonaker*, L. R., 4 Eq. 655; and the cases there cited.

2. Of Disclaimer by Trustees in Bankruptcy.

Of Disclaimer by Trustee in Bankruptcy.

It has long been an established principle of law that there is a wide distinction between persons taking an assignment of leaseholds or shares, or other property to which liability attaches by way of contract or as executors of a deceased testator, and the assignees of a bankrupt who take his whole estate by operation of law. See *Wilkins* v. *Fry*, 1 Mer. 244; *Levi* v. *Ayres*, 3 App. Ca. 842. By the present Bankruptcy Act (46 & 47 Vict. c. 52), sect. 55, the trustee of the property of a bankrupt is empowered to disclaim property of an onerous or unprofitable nature. The section is as follows:—

Disclaimer of onerous property (*e*).

"(1.) Where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, but subject to the provisions of this section, may, by writing signed by him, at any time within three months after the first appointment of a trustee, disclaim the property.

"Provided that where any such property shall not have come to the knowledge of the trustee within one month after such appointment, he may disclaim such property at any time within two months after he first became aware thereof.

"(2.) The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person.

(*e*) This section contains provisions of which some are new, but the greater part are taken from the provisions contained in sects. 23 and 24 of the Bankruptcy Act, 1869, and from rule 28 of the Orders of 1871; it will be convenient to set out at length these sections and rule for purposes of reference and comparison.

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"(3.) A trustee shall not be entitled to disclaim a lease without the leave of the Court, except in any cases which may be prescribed by general rules, and the Court may, before or on granting such leave, require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such orders with respect to fixtures, tenant's improvements, and other matters arising out of the tenancy as the Court thinks just.

"(4.) The trustee shall not be entitled to disclaim any property in pursuance of this section in any case where an application in writing has been made to the trustee by any person interested in the property requiring him to decide whether he will disclaim or not, and the trustee has for a period of twenty-eight days after the receipt of the application, or such extended period as may be allowed by the Court, declined or neglected to give notice whether he disclaims the property or not; and, in the case of a contract, if the trustee, after such application as aforesaid, does not within the said period or extended period disclaim the contract, he shall be deemed to have adopted it.

"(5.) The Court may, on the application of any person who is, as against the trustee, entitled to the benefit or subject to the burden of a contract made with the bankrupt, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise, as to the Court may seem equitable, and any damages payable under the order to any such person may be proved by him as a debt under the bankruptcy.

"(6.) The Court may, on application by any person either claiming any interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just; and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose.

"Provided always, that where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as underlessee or as mortgagee by demise except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect

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of the property at the date when the bankruptcy petition was filed, and any mortgagee or underlessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and if there shall be no person claiming under the bankrupt who is willing to accept an order upon such terms, the Court shall have power to vest the bankrupt's estate and interest in the property in any person liable either personally or in a representative character, and either alone or jointly with the bankrupt to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances, and interests created therein by the bankrupt.

"(7.) Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the bankrupt to the extent of the injury, and may accordingly prove the same as a debt under the bankruptcy."

Time within which the disclaimer must be made.

Time for Disclaiming.]—The limit of time assigned to a trustee in bankruptcy for deciding whether or not he will disclaim onerous property is three months from the date of his appointment, or at furthest two months from the time when the existence of the property comes to his knowledge. This limit is for the first time introduced by the present Act, and the Court has no power to grant any extension of it. The trustee may, moreover, at any time after his appointment, be called upon by any person interested in the property to decide within twenty-eight days, or such extended period as may be allowed by the Court, whether he will disclaim the property or not.

Extension of time for disclaimer.

The Court has power to grant such extension of time, although the period of three months given to the trustee by sub-sect. (1) of this section has expired: *Ex parte Forman, Re Price*, 13 Ch. D. 466. See also sect. 105, sub-sect. (4) of the Bankruptcy Act, 1883, and *Banner* v. *Johnston*, L. R., 5 H. L. 157.

Where time for disclaimer extended.

An application for extension of time beyond the twenty-eight days must be made before those days have expired, unless the trustee can show special circumstances to account for the delay: *Ex parte Lovering, Re Jones*, L. R., 9 Ch. A. 586; and to constitute such special circumstances mere hardship is

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not sufficient; it must generally be shown that the trustee has been misled, or induced to rely on an apparent forbearance on the part of the person interested: *Ex parte Harris*, *Re Richardson*, 16 Ch. D. 613. The right to insist on an answer within the twenty-eight days may be impliedly waived by the conduct of the person interested: *Ex parte Moore*, *Re Stokoe*, 2 Ch. D. 802. It was held under the corresponding clause in sect. 24 of the Bankruptcy Act of 1869, that the application to the trustee to disclaim within twenty-eight days, must be shown to have been not merely posted, but actually received by the trustee, or left at his place of abode or business, in order that the time for disclaimer may be limited: *Reed* v. *Harvey*, 5 Q. B. D. 184.

Form of disclaimer.

A statutory form of notice of disclaimer by a trustee in bankruptcy is given in Form 76 of the Appendix to the Bankruptcy Rules, 1883. It must be signed by the trustee in person; signature by his solicitor or agent is not sufficient: *Wilson* v. *Wallani*, 5 Ex. D. 155.

Leave of Court to disclaim leasehold interests.

Leave to Disclaim.]—Leave of the Court must generally be obtained by a trustee before disclaiming a lease (*f*), except in the cases provided by the general rules. By rule 232 of the Bankruptcy Rules, 1883, it is provided that,

"A lease may be disclaimed without the leave of the Court in any of the following cases, namely:—Where the bankrupt has not sublet or assigned the lease or created any mortgage or charge thereon; and

(a) The rent reserved and real value of the property leased, as ascertained by the property tax assessment, are less than twenty pounds per annum; or

(b) The estate is administered under the provisions of sect. 121 of the Act (*g*); or

(*f*) The Act of 1869 did not render it necessary for the trustee to obtain leave to disclaim a lease, but, by rule 28 of the General Rules of 1871, it was provided that leave of the Court must be first obtained for that purpose, and that upon an application for such leave, such order should be made thereon as the Court should think fit.

(*g*) Sect. 121 of the Act relates to small bankruptcies. Where,

(c) The trustee serves the lessor with notice of his intention to disclaim, and the lessor does not within seven days after the receipt of such notice give notice to the trustee requiring the matter to be brought before the Court. **Of Disclaimer by Trustee in Bankruptcy.**

Except as provided by this rule, the disclaimer of a lease without the leave of the Court shall be void."

The power of the Court to allow a trustee to disclaim a lease is discretionary: *Re Wilson*, L. R., 13 Eq. 186. In the exercise of its discretion, on the question as to whether leave for a trustee to disclaim a lease shall be granted or refused, the Court will be guided entirely by considerations relating to the benefit of the persons interested in the administration and distribution of the debtor's estate, and will not take into account any injury which the disclaimer may cause to others: *Ex parte E. & W. India Docks Co., Re Clarke* (C. A.), 17 Ch. D. 759 (*h*). But where such injury is shown the Court will impose conditions on the trustee in granting him leave to disclaim. Discretion of Court to allow lease to be disclaimed.

The principle on which the Court acts with regard to this point is thus stated by *Jessel*, M. R.:—"The trustee is not to be allowed to increase the bankrupt's estate at the expense of the landlord by retaining possession of his property, and then keeping the profit he has made by so doing. But you must first show that a benefit has resulted to the bankrupt's estate from the trustee's occupation of the property:" *Ex parte Izard, Re Bushell*, 23 Ch. D. at p. 117; and consequently the trustee will only be ordered to pay compensation to the landlord Principle on which Court exercises its discretion.

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after an order for summary administration has been made under this section, the trustee disclaims without leave, the Court has no jurisdiction to allow any compensation to the landlord out of the bankrupt's estate, for the use and occupation of the premises by the trustee for the purposes of the bankruptcy: *Ex parte Zerfass, Re Sandwell*, W. N. 1885, p. 63.

(*h*) So formerly a disclaimer by a trustee without leave, being merely the infraction of a rule of Court, was held to be a breach on his part of his duty towards the Court, but to be valid as between the trustee and the lessor: *Reed* v. *Harvey*, 5 Q. B. D. 184. Now, however, the prohibition is in the statute itself, and it would seem that this decision no longer applies.

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where it is proved that the occupation has been beneficial to the estate of the bankrupt, or at all events was retained by the trustee with the view of benefiting the estate. See *Ex parte Isherwood, Re Knight*, 22 Ch. D. 384; *Ex parte Arnal, Re Wilton*, 24 Ch. D. 26. In a proper case, however, the trustee will not be allowed to disclaim, except on the terms of paying to the landlord all rent due up to the date of the disclaimer: *Ex parte Ladbury, Re Turner*, 17 Ch. D. 532 (*i*). So leave will not be granted to a trustee to disclaim a lease which is subject to an equitable mortgage, to the prejudice of the mortgagee; but if the trustee assigns the lease to the mortgagee, the latter must covenant to indemnify the trustee against liability under the lease: *Ex parte Buxton, Re Müller*, 15 Ch. D. 289. It has been held that the trustee may be required, on being properly indemnified, to assign the lease, in pursuance of a contract entered into by the debtor before his suspension of payment, and that if the trustee refuses so to do, he ought not to be allowed to disclaim: *Ex parte Edmunds, Re Tipping*, W. N. 1883, p. 14.

Where a trustee has obtained unconditional leave to disclaim, the Court of Appeal has no power to impose conditions after the disclaimer has been executed. A person interested, intending to appeal from an order giving the trustee leave to disclaim, should apply for stay of proceedings pending the appeal: *Ex parte Sadler, Re Hawes*, 19 Ch. D. 122. See also *Ex parte Ditton, Re Woods*, 3 Ch. D. 459.

Operation of disclaimer in point of time.

Operation and effect of Disclaimer by Trustee in Bankruptcy.]—Under former bankruptcy statutes, a disclaimer operated as from the date of the adjudication of bankruptcy, but under the present Act it operates as from the date of the disclaimer, except as regards the personal liability of the trustee, in which case alone it has a retrospective effect.

(*i*) See *supra*, p. 844, note (*g*).

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By sect. 54 of the Bankruptcy Act, 1883, the property of a debtor divisible among his creditors vests in the trustee immediately upon the making of the order of adjudication, or on his subsequent appointment as trustee, subject to be divested by disclaimer under sect. 55 of that Act. The bankrupt is thenceforth deprived of all interest in the property, and is liberated from all contracts, liabilities, engagements, and contingencies in respect thereof. See *Ex parte Llynvi Coal and Iron Co., Re Hide*, L. R., 7 Ch. A. at p. 32. So full and complete is the discharge of the liability of the debtor by his adjudication as a bankrupt, that where a bankrupt lessee, after his discharge, purchased the leaseholds from his assignees in bankruptcy, his liability as original lessor did not revive, but he took as any ordinary assignee of a lease: *Doe* v. *Smith*, 5 Taunt. 795. The position of a bankrupt lessee is in no way affected by the subsequent disclaimer of the lease by his trustee in bankruptcy, the effect of which, under the present Act, is to determine, as from the date of the disclaimer, the rights, interests, and liabilities of the bankrupt and his property, in or in respect of the property disclaimed.

Effect of disclaimer as regards the bankrupt.

Effect as regards the trustee.

The effect of a disclaimer as regards the disclaiming trustee, is to discharge him from all personal liability as from the date when the property vested in him by virtue of the order of adjudication, or of his appointment as trustee, if subsequent to the order. Leave to disclaim a lease may be given to a trustee after a lease has been determined, by effluxion of time or otherwise, before the disclaimer is executed. The effect of such a disclaimer is thus stated by *Jessel*, M. R.: "It puts an end not merely to the term, but to the lease itself. On the one hand, therefore, it deprives the landlord of the future benefit of all those clauses of the lease which give him a benefit; and, on the other hand, it deprives the tenant of the future benefit of all those clauses in the lease which give him a benefit; the result, therefore, is that in the present case, neither party can claim the benefit of those provisions of

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the lease which arise only at the end, or sooner determination, of the lease; and that in the main point of the case the chief judge therefore was, in my opinion, right in holding that the tenant had lost his right to be paid for the cottages and tillages; and, on the other hand, the landlord had lost his right to take the hay and straw at feed prices, or at any but the market price:" *Ex parte Hart Dyke, Re Morrish*, 22 Ch. D. at p. 426. See also *Ex parte Paterson, Re Throckmorton*, 11 Ch. D. 908; *Ex parte Glegg*, 19 Ch. D. 7; *Ex parte Allen, Re Fussell*, 20 Ch. D. 341.

Right to sell crops, &c.

This provision is, however, subject to existing rights of parties under any unrepealed statute. A lease contained a covenant not to sell hay, &c., without permission of the landlord, except after having offered it to him at a market price; it was held by *Chitty*, J., that the provisions of the statute 56 Geo. 3, c. 50, s. 6, were still in force, that no assignee of a bankrupt should use or dispose of hay, &c., otherwise than the tenant would have been entitled to do had no commission of bankruptcy issued; and that the trustee in bankruptcy of the tenant, who had disclaimed the lease under sect. 23 of the Bankruptcy Act, 1869, was not entitled, without permission, to remove for sale ricks of hay, &c., on the farm at the date of the disclaimer: *Lybbe* v. *Hart*, W. N. 1883, p. 61. See also *Ex parte Whittington*, Buck. 87. Where, however, a lease contained a covenant "that the lessee shall and may have and take a going-off crop from two-third parts of the arable lands, &c., on the effluxion of the lease, or sooner determination of the said term," and the lessee, having become bankrupt, his assignees refused to accept the lease, it was held that the assignees were entitled to take the off-going crop, paying rent up to the time when possession of the premises was delivered to the lessor: *Ex parte Maundrell, Re Dark*, 2 Mad. 315. See also *Ex parte Nixon*, 1 Rose, 445.

Right to remove fixtures.

As a general rule, if a tenant does not remove tenant's fixtures during the continuance of the term

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he will not, in the absence of express stipulation, be entitled to do so on the determination of the term, whether by effluxion of time, or by re-entry or forfeiture, but all fixtures then unsevered will vest in the landlord: *Pugh* v. *Arton*, L. R., 8 Eq. 626. See Woodfall's Landlord & Tenant, p. 614. And see also *infra*, tit. Leases, where this question will be fully discussed. Where, however, a lease, containing a stipulation that the tenant might remove fixtures "at the expiration of the term," was determined by the bankruptcy of the tenant, it was held that his assignees in bankruptcy were entitled to a reasonable time for removal of the fixtures: *Stansfield* v. *Mayor of Portsmouth*, 4 C. B., N. S. 120. And where a trustee in liquidation of an insolvent lessee sold the tenant's fixtures, and then surrendered the premises to the lessor, it was held that the purchaser was entitled to remove the fixtures after the surrender: *Saint* v. *Pilley*, L. R., 10 Ex. 137.

Effect of disclaimer as to fixtures.

Under the Bankruptcy Act, 1869, the effect of the disclaimer of a lease was to give up to the lessor all claim to trade machinery, or tenant's fixtures and improvements: *Ex parte Stephens*, *Re Lavies*, 7 Ch. D. 127; *Ex parte Brook*, *Re Roberts*, 10 Ch. D. 100; *Ex parte Glegg*, *Re Latham*, 19 Ch. D. 7. So where lands and chattels were demised by a lease at one entire rent, it was held that a disclaimer of the lease by the trustee in bankruptcy of the lessee operated as a surrender of the chattels as well as of the land to the lessor, and that the trustee could not claim the chattels as being in the order and disposition of the bankrupt as reputed owner with the consent of the true owner: *Ex parte Allen*, *Re Fussell*, 20 Ch. D. 341. But under the present Act the Court, in giving leave to disclaim, has a discretionary power to make such orders as to fixtures, tenant's improvements, &c. as may appear just; and in a recent case, it has been decided that where a trustee disclaims a lease, the landlord must either take over the fixtures at a valuation or allow the trustee a reasonable time in which to sever or

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remove them: *Re Mosen*, 13 Q. B. D. 738. See also *Ex parte Gould, Re Walker*, 13 Q. B. D. 454.

Fixtures under the Agricultural Holdings (England) Act, 1883.

As regards tenancies coming under the operation of the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), a tenant is, by sect. 1, entitled, on quitting the holding on the determination of the tenancy, to compensation for improvements made by him on his holding; and by sect. 34, where the tenant has affixed any engine, machinery, fencing, or other fixture, such fixture, instead of belonging to the landlord, is removable by the "tenant," in which term is included the trustee in bankruptcy of a tenant. "The determination of a tenancy means the cesser of a contract of tenancy by reason of effluxion of time *or any other cause:*" sect. 61.

Liability of trustee who does not disclaim.

Trustees who omit or are unable to disclaim a lease become personally liable for the rent which accrues due after the property becomes vested in him. "They are liable as assignees of the estate to pay the rent, and, as between themselves and the landlord, they are personally liable, though they are entitled to an indemnity out of the debtor's assets. And no injustice will be done to them, for they ought to have retained out of the assets a sum sufficient to answer the rent:" per *James*, L. J., in *Ex parte Dressler, Re Solomon*, 9 Ch. D. 252. See *Wilson* v. *Wallani*, 5 Ex. D. 155. But his liability in respect of covenants contained in a disclaimed lease does not extend to breaches committed before his appointment: *Titterton* v. *Cooper*, 9 Q. B. D. 473. Where a trustee did not disclaim the lease of a farm, but continued to carry on the business for the benefit of the creditors until the termination of the tenancy, it was held that the landlord was not entitled to set off arrears of rent which had accrued due from the debtor before the lease became vested in the trustee against the claim of the latter in respect of allowances for value of tillage and cultivation during his occupation, according to the custom of the district: *Alloway* v. *Streen*, 10 Q. B. D. 22. If a trustee does not disclaim a lease within the prescribed limit of time there are

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no means open to him by which he can afterwards repudiate the property if it turns out to be onerous or unprofitable: *Turner* v. *Richardson*, 7 East, 342; but he may get rid of his liabilities under a lease by assigning it to a pauper: *Onslow* v. *Corrie*, 2 Mad. 330; *Wilkins* v. *Fry*, 1 Mer. 265; *Hopkinson* v. *Lovering*, 11 Q. B. D. 92; and that notwithstanding a covenant in the lease against assignment without licence of the landlord: *Goring* v. *Warner*, 7 Vin. Abr. 85; *Doe* d. *Goodebeere* v. *Beavan*, 3 Mau. & S. 353. But the trustee may be sued for breaches of covenant committed by him while in occupation of the premises, and before the privity of estate between him and the lessor was determined by the assignment: *Harley* v. *King*, 2 C., M. & R. 18. The assignment of a lease may be expressly for the purpose of getting rid of the liability; *Fagg* v. *Dobie*, 3 Y. & C., Ex. 96. But it must be absolute, and not a collusive arrangement whereby the apparent assignee is merely to manage the property, while the apparent assignor really continues the beneficial owner: *Philpot* v. *Hoare*, 2 Atk. 219. And see *Hopkinson* v. *Lovering*, 11 Q. B. D. at p. 97.

Trustee may forfeit contract by conduct.

A trustee may without actual disclaimer disentitle himself by his conduct from claiming the benefit of a contract. Under a mercantile contract goods were to be delivered in specified quantities at regular intervals of time, payment to be made by instalments in cash within fourteen days after delivery of each lot. After the whole had been delivered, except the last lot, the purchaser suspended payment, and was subsequently adjudicated a bankrupt; the instalment of purchase-money in respect of the last lot but one not having been paid, the vendor refused to deliver any more goods: it was held that the trustee in the bankruptcy, not having tendered the price of the last two instalments, could not claim damages for non-delivery of the goods: *Ex parte Chalmer*, *Re Edwards*, L. R., 8 Ch. A. 289. See also *Morgan* v. *Bain*, L. R., 10 C. P. 15.

Liability for use and occupation after disclaimer.

It would seem that the personal liability of a trustee who has disclaimed will revive if he remains in occupation of the premises after the dis-

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claimer. See the observations of *Cockburn*, C. J., and *Thesiger*, L. J., in *Lowrey* v. *Barker*, 5 Ex. D. 170.

Sureties, joint owners, &c.

Where the payment of the rent reserved by a lease, and the observance of the covenants contained therein are guaranteed by a third party, neither the acceptance nor the disclaimer of the lease by the trustee in bankruptcy of the lessee will release the surety from his liability to the lessor: *Inglis* v. *M'Dougal*, 1 Moo. 196. See also *Ex parte Walton*, *Re Levy*, 17 Ch. D. at p. 756. So, also, a disclaimer by the trustee in bankruptcy of one of two joint tenants will leave the other joint tenant liable to the landlord for the whole of the rent. In a recent case, a lease of land and minerals was granted to two partners in trade as joint tenants; one of the partners retired, selling his interest in the business to, and covenanting that he would stand possessed of his interest in the land upon trust for the continuing partner, who shortly afterwards became insolvent, and filed a petition for liquidation under the Bankruptcy Act, 1869. The rent due under the lease was paid by the retired partner to the landlord. It was held, that leave to disclaim the debtor's interest in the lease ought to be granted to the trustee only on the terms of his recouping the retired partner the amount he had paid to the landlord: *Ex parte Good*, *Re Salkeld*, 13 Q. B. D. 731. A lease was granted to four partners, who jointly and severally covenanted for payment of the rent. One of the partners having died, the surviving three became bankrupt, and their trustee disclaimed the lease. It was held that the lessor was entitled to prove for injury sustained by reason of the disclaimer against the separate estates of the three surviving partners: *Ex parte Corbett*, *Re Shand*, 14 Ch. D. 122.

Assignee of lease.

The Bankruptcy Act of 1869, sect. 23, provided, with regard to leasehold property, that upon the execution of a disclaimer, the lease was to be deemed to have been surrendered on the date of the order of adjudication. The interpretation of this clause was found to raise questions of much

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doubt and difficulty, and occasioned considerable conflict of judicial opinion. The present Act, however, contains no such provision, but enacts that a disclaimer, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, is not to affect the rights or liabilities of any other person. It has long since been settled, that where a lease has been assigned, and the assignee has become bankrupt, the original lessee becomes liable to the lessor on the covenants in the lease: *Auriol* v. *Mills*, 1 H. Bl. 433; *S. C.*, 1 Sm. L. C. 838; *Manning* v. *Flight*, 3 B. & Ad. 211: *Taylor* v. *Young*, 3 B. & Ad. 521. Where, therefore, a trustee of a bankrupt assignee disclaims the lease, the lessor may sue the original lessee for all rent which has accrued due as well after as before the disclaimer: *Smyth* v. *North*, L. R., 7 Ex. 242; *Ex parte Walton*, *Re Levy*, 17 Ch. D. 746; *Harding* v. *Preece*, 9 Q. B. D. 281; *Hill* v. *E. & W. India Dock Co.*, 9 App. Ca. 448.

An assignee of a lease is liable to the lessor only in respect of the privity of estate, which ceases if the assignee in his turn assigns the lease to another person, except as regards breaches committed before such assignment: *Beardman* v. *Wilson*, L. R., 4 C. P. 57; and see *post*, tit. Leases.

Underlessee.

An important question arises, where a lessee, having sub-let the demised property, has become bankrupt and his trustee has disclaimed the lease, as to the liabilities and rights of the sub-lessee as between himself and the superior lessor. In such a case, there being no privity of contract between these parties, it is quite clear that the sub-lessee cannot be sued by the superior landlord in respect of non-payment of the rent reserved by, or breach of the covenants contained in, the original lease: *Halford* v. *Hatch*, 1 Doug. 183; *Earl of Derby* v. *Taylor*, 1 East, 502. On the other hand, it is conceived that under the present Act there is no equity to compel the lessor to accept the sub-lessee as his tenant on the terms either of the original lease or of the underlease. This point was considered with reference to the provisions of the Act of 1869,

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sect. 23, in the case of *Taylor* v. *Gillatt*, L. R., 20 Eq. 682. In that case the lessee of a house agreed to sub-let a part of the premises in consideration of a premium at a less rent than he paid, and the provisions of the agreement materially differed from the lessee's covenants contained in the lease; the lessee afterwards became bankrupt, and his trustee disclaimed the lease, and the lessor commenced an action to eject the sub-lessee; it was held that the sub-lessee had no equity to compel the lessor to grant him a lease in accordance with the terms of the agreement for an underlease. In the case of *Smalley* v. *Hardinge*, 6 Q. B. D. 371, *Mathew*, J., took the same view where an underlessee had actually granted an underlease, and held that the lessor was entitled to eject the sub-lessee, notwithstanding that the legal estate was vested in him by the sub-demise. This decision was reversed on appeal, but solely on the ground that upon the construction of the Act of 1869, the disclaimer must be taken to be equivalent to a surrender at common law, notwithstanding that there was no voluntary acceptance on the part of the lessor, and that the statute in effect said that the lessor was to be deemed to have acted voluntarily, in which case he would of course accept the surrender, subject to the underlease. See *S. C.*, 7 Q. B. D. 524. This *ratio decidendi* no longer exists, and it would seem that an underlessee cannot now, after a disclaimer of the lease, claim to remain in occupation on the terms of his underlease.

Landlord's power of distress of premises in occupation of underlessee.

The clause in the present Act, saving the rights and liabilities of third parties in case of disclaimer of a lease by a trustee, adopts the principle of the decision in *Ex parte Walton*, *Re Levy*, 17 Ch. D. 746. In that case an underlease was granted by two partners, who afterwards filed a petition for liquidation under the Bankruptcy Act, 1869: it was held that the effect of a disclaimer of the lease by the trustee of the debtor was that, although the lessor had no remedy by contract *in personam* as against the underlessee, his right *in rem* by distress on the demised property for the rent reserved by the original lease, or by re-entry for

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breach of the covenants therein contained, remained unaffected; and it was further held that if the underlease is made at a rent less than the rent reserved by the original lease, the underlessee is entitled to prove against the estate for the difference in value between the two rents. The combined effect of these two decisions would seem to be that under the repealed Bankruptcy Act, 1869, an underlessee was entitled to remain in occupation at the rent, and upon the terms of the original lease. But it is conceived that, having regard to the terms of sect. 55 of the present statute, and to the omission therefrom of the provision that a disclaimer shall operate as a surrender, the effect of a disclaimer will be to put an end to the lease as between the lessor on the one hand, and the bankrupt and his trustee on the other, and to leave the lessor at full liberty to distrain for arrears of rent due to him by the bankrupt on the demised premises, and to eject therefrom the underlessee, between whom and the lessor there is, as has been observed above, no privity of contract.

Vesting orders.

The provisions of the Bankruptcy Act, 1883, sect. 55, sub-sect. 6, empowering the Court to dispose of disclaimed property by means of vesting orders, are new. Opposed applications for vesting orders under this section are not to be heard by a registrar of the High Court in chambers: Order of 1st Jan. 1884, rule 2.

Effect of disclaimer of property other than leaseholds.

The foregoing observations have, for the most part, reference to leasehold property. The operation of disclaimer by a trustee of other kinds of property of an onerous description will depend upon the nature of the particular property disclaimed.

Freeholds.

Freeholds burdened with onerous covenants may be disclaimed by a bankruptcy trustee. See *Re Beardsworth*, 28 W. R. 485; in such a case it would appear that the estate will escheat to the Crown. See the observations of *Jessel*, M. R., in *Re Mercer and Moore*, 14 Ch. D. at p. 295.

Shares.

Under the present Bankruptcy Act, as under the statutes prior to the Act of 1869, the disclaimer of shares does not operate as a forfeiture.

Of Disclaimer by Trustee in Bankruptcy.

If a trustee has disclaimed before a call is made, neither he nor the bankrupt can be placed on the list of contributories: *Re West of England Bank, Ex parte Budden*, 12 Ch. D. 288.

Contracts.

Under the Bankruptcy Act, 1869, a trustee who had not disclaimed a contract might take it up and perform it so long as it proved profitable, and on its ceasing to be so, might give it up at any time; and it was held that the only remedy of the other contracting party was to prove against the debtor's estate for damages for the breach of contract: *Ex parte Davis, Re Sneezum*, 3 Ch. D. 463. The new provisions contained in sub-sects. 4 and 5 of sect. 55 of the present Act are evidently intended to relieve those who have entered into contracts with a person who afterwards becomes bankrupt from the hardship caused by this decision. See Lee & Wace on Bankruptcy, p. 460.

Proof for injury sustained by disclaimer.

The provision in sect. 55 of the Bankruptcy Act, 1883, with regard to proof by a person injured by the operation of a disclaimer against the debtor's estate for the injury, is virtually identical with the provision contained in sect. 23 of the Act of 1869. Under the last-named Act it was held that where certain houses were held under an agreement for a lease at a rent of 500*l.* per annum for a term of ten years, and the trustee in liquidation of the lessee disclaimed, the measure of the injury sustained by the lessor was the difference between the rent payable under the agreement and the rent which could at the time of the disclaimer be obtained for the property: *Ex parte Llynvi Coal and Iron Co., Re Hide*, L. R., 7 Ch. A. 28. Where a lease for twenty-one years was determinable on notice by the lessor at the end of the first seven or fourteen years, and in the sixth year of the term the lessee filed a petition for liquidation, and the trustee disclaimed, it was held that the lessor was entitled to prove for the difference between the stipulated and the obtainable rents up to the end of the seventh year of the term, and also for the amount necessary to put the premises into repair: *Ex parte Blade, Re McEwen*, 11 Ch. D. 572. As to injury done to an

Of Disclaimer by Trustee in Bankruptcy.

underlessee by disclaimer of the superior lease, see *Ex parte Walton*, *Re Levy*, 17 Ch. D. at p. 759, *ante*, p. 851. Where goods sold on credit are still in the vendor's possession when the purchaser becomes bankrupt, the trustee has a right to adopt the contract by paying for the goods within a reasonable time, but if he does not do so the vendor is entitled to resell the goods without tendering them to the trustee, and if the market is falling he will be entitled to prove against the estate of the bankrupt for the difference between the contract price and the amount actually obtained: *Ex parte Stapleton*, *Re Nathan*, 10 Ch. D. 586.

PRECEDENTS.

I. *DISCLAIMER by Deed-Poll, by one of two Trustees and Executors of a Will.*

Exordium. TO ALL TO WHOM THESE PRESENTS SHALL COME [*disclaiming trustee*], of &c., sendeth greeting. Recital of will. WHEREAS [*testator*], late of &c., deceased, duly made and executed his will, dated &c., and thereby, after bequeathing divers pecuniary and specific legacies therein mentioned, gave, devised, and bequeathed all his real and personal estate to the said [*disclaiming trustee*] and [*continuing trustee*], of &c., their heirs, executors, administrators, and assigns, upon the trusts therein declared and contained of and concerning the same respectively: And the said testator appointed the said [*trustees*] executors of his said will [and guardians of his infant children]: Death of testator. AND WHEREAS the said [*testator*] died on the ——— day of ———, 18—, without having revoked or altered his said will: Recital that disclaiming trustee having declined to act, the other trustee proved the will. AND WHEREAS the said [*disclaiming trustee*] has declined to prove the said will, or to accept the gifts, devises, or bequests thereof [or the guardianship of the said children], or in anywise to administer to the estate of the said [*testator*], or to act or interfere in the trusts of the said will. Disclaimer. NOW KNOW YE, that the said [*disclaiming trustee*] hereby absolutely and wholly renounces and disclaims the offices of trustee and executor (*a*) of the said will [and of

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(*a*) The probate will be renounced in the Probate Division of the High Court of Justice. If the executor once intermeddle with the assets before a formal disclaimer, he is bound by such implied acceptance of the office and cannot retract: Bac. Abr. *Executors* (E. 10).

An executor may revoke a formal disclaimer at any time before administration is taken out in default of probate: *Rex* v. *Simpson*, 1 W. Bl. 456; *Thompson* v. *Dixon*, 3 Add. 272. See *Broker* v. *Charter*, Cro. Eliz. 92. It has been laid down, that the disclaimer

guardian of the said children], and all the real and personal estates, trusts, powers, and authorities whatsoever, thereby given, devised, or bequeathed to the said [*disclaiming trustee*], either jointly with the said [*continuing trustee*] or otherwise howsoever. In witness, &c. I. By One of Two Trustees of a Will.

II. *DISCLAIMER by* Trustee *and* Executor *of a* Will—Reservation *of* Beneficial Interest (*Short Form*).

KNOW ALL MEN by these presents that I [*disclaiming trustee, &c.*] do hereby disclaim and renounce the offices of trustee and executor of the will of [*testator*], late of &c., deceased (who died on the ——— day of ———, 18—), and all estates, trusts, and powers thereby expressed to be given to me; But this disclaimer shall not extend to any legacy or bequest thereby given to me, or to any beneficial interest vested or contingent to which I am or may become entitled under or by virtue of the said will. In witness, &c. Disclaimer. Reservation.

III. *DISCLAIMER of the Trusts of a* Settlement (*by Supplemental Deed*).

THIS DEED, made the ——— day of ———, 18—, by [*disclaiming trustee*], and supplemental to an indenture of Disclaimer.

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of an executor is not final, even after administration has been granted, but may be revoked after the death of the administrator; 2 Roberts on Wills, 171; but this doctrine has been overruled: *In the goods of Thornton*, 3 Add. 273. But, if there are several executors, and one has renounced and the others proved, he may afterwards prove: *Brookes* v. *Brookes*, 1 Salk. 3; *Rex* v. *Simpson*, 1 W. Bl. 456; *Arnold* v. *Blencowe*, 1 Cox, 426; *Cottle* v. *Aldrich*, 4 Mau. & S. 177. Therefore, it was at one time held that where one executor, who had proved, died, leaving another, who had renounced, surviving, the representation did not belong to the executor of the deceased executor. But by stat. 20 & 21 Vict. c. 77, s. 79, where any person, after the commencement of this Act, renounces probate of the will of which he is appointed executor, or one of the executors, the rights of such person in respect of the executorship shall wholly cease, and the representation of the testator, and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor.

III. Of Trusts of a Settlement.

settlement dated the ——— day of ———, 18—, and expressed to be made between [*parties*]: WITNESSETH, that the said [*disclaiming trustee*] hereby renounces and disclaims the office of trustee of the principal indenture, and all estates, property, trusts, powers, and privileges thereby given to or vested in him, either alone or jointly with any other person or persons whomsoever. IN WITNESS, &c.

IV. *DISCLAIMER of Trusts of a* SETTLEMENT *and Appointment of a New Trustee in his Place by the Continuing Trustee—Vesting Declaration (by Endorsement).*

Parties.

THIS INDENTURE, made the ——— day of ———, 18—, BETWEEN the within-named [*disclaiming trustee*], of the first part; the within-named [*continuing trustee*], of the second part; the within-named [*husband*] and [*wife*], his wife, in the within-written indenture called [*maiden name*], spinster, of the third part; and [*new trustee*], of &c., of the fourth part: WHEREAS the marriage of the said [*husband*] and [*wife*] was duly solemnized shortly after the date of the within-written indenture: AND WHEREAS the said [*disclaiming trustee*] has never executed the within-written indenture, nor acted or interfered in the trusts thereof, and is desirous of renouncing and disclaiming the same: AND WHEREAS the said [*continuing trustee*] and also the said [*husband*] and [*wife*] are desirous that the said [*new trustee*] shall be appointed as trustee of the principal indenture in the place of the said [*disclaiming trustee*]: AND WHEREAS [*recite intention to transfer stocks, &c., ut ante*, p. 39]: NOW THIS INDENTURE WITNESSETH that the said [*disclaiming trustee*] hereby renounces and disclaims the office of trustee of the within-written indenture, and all estates, property, trusts, powers and privileges thereby given to or vested in him, either alone or jointly with any other person or persons whomsoever. AND THIS INDENTURE ALSO WITNESSETH, that the said [*continuing trustee*], in exercise of the power in that behalf

Recital of marriage:

Of trustee's desire to disclaim:

Of desire to appoint new trustee.

Testatum.

Disclaimer.

Further testatum.

Appointment

IV. Of Trusts of a Settlement and Appointment of New Trustee.

of new trustee.

Vesting declaration.

given to him by the Conveyancing and Law of Property Act, 1881, and of every other power him hereunto enabling, and with the assent and approval of the said [*husband*] and [*wife*], testified by their respective execution of these presents, do hereby appoint the said [*new trustee*] to be a trustee in place of the said [*disclaiming trustee*], and to act jointly with the said [*continuing trustee*] for the purposes of the within-written indenture: And the said [*continuing trustee*], with the consent and approbation of the said [*husband*] and [*wife*], testified as aforesaid, do hereby declare that all the estate and interest now vested in the said [*continuing trustee*] of and in [*continue as at* p. 37 *or* 39]. In witness, &c.

ENFRANCHISEMENT OF COPYHOLDS.

Vide 50 & 51 Vict. c. 73. 1887.

PRELIMINARY DISSERTATION.

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Nature of an enfranchisement by the common law.

Enfranchisement at Common Law.]—Enfranchisement is a conveyance or release by the lord immediately, or by his alienee, *Lane's Case*, 2 Rep. 16, to the tenant, of the freehold estate in, or of the seignorial rights over, the particular copyhold lands; whereupon the lands are severed from the manor, and the tenant becomes seised of them in free and common socage, as tenant to the superior of whom the lord holds the manor, and not as a freeholder liable to do suit to the lord's court-baron: *Bradshaw* v. *Lawson*, 4 T. R. 443.

Lord having limited estate, cannot effect a complete enfranchisement.

An enfranchisement, being in the nature of a release of the freehold reversion expectant on the tenant's estate at will, is, at common law, effectual only to the extent of the lord's estate, and if the latter is partial or defeasible, upon its determination the customary tenure revives: *Conesbie* v. *Rusky*, Cro. Eliz. 459; 2 Roll. Ab. 271; *Doe* d. *North* v. *Webber*, 5 Scott, 189 (*a*). In such a case there is merely a temporary suspension of the copyhold interest, but no enfranchisement: Shelford on Copyholds, 250. It is therefore incumbent on a copyholder, who gives a valuable consideration for an enfranchisement, to ascertain that the lord is competent in respect of estate to make it, or has a

(*a*) A dictum in *Lee* v. *Boothby*, Cro. Car. 521, to the contrary, is clearly erroneous.

power reserved to him for that purpose (*b*), otherwise recourse must be had to the provisions of the Copyhold Acts, *infra*. It seems that the want of a formal admittance would in most cases be immaterial; because admittance is merely an acknowledgment of the tenure by the lord; and the act of enfranchisement must almost always amount to a sufficient recognition of the tenure for that purpose. See *Wilson* v. *Allen*, 1 Jac. & W. 611; *Minton* v. *Kirwood*, 12 Jur., N. S. 86.

Enfranchisement at Common Law.

Necessity of admittance.

The conveyance, by way of enfranchisement, should be made directly to the copyholder, and not to a trustee for him, otherwise the copyhold interest and its customary incidents will not be effectually extinguished: *Howard* v. *Bartlet*, Hob. 181; *Walter* v. *Bartlet*, Cro. Jac. 573; 2 Roll. Rep. 178; *Lashmer* v. *Avery*, Cro. Jac. 126.

How made.

It would also appear that a copyholder, accepting an enfranchisement, brings upon the estate any incumbrances affecting the manor (*c*).

Effect of enfranchisement where manor encumbered.

It is commonly laid down that, where the copyholder is tenant for years, or for life, or in tail, the enfranchisement operates to extinguish the customary tenure for ever, and to pass the absolute fee simple out of the lord, for the benefit of those entitled in remainder: Shelford, Cop. 253; Scriven, Cop. 283.

Enfranchisement where the copyholder has only a limited interest.

The authorities on this point are conflicting, and will be now briefly examined.

(*b*) There seems to be no peculiarity in an enfranchisement under a power; it is merely an authority to appoint the legal freehold to the copyholder, and seems to be included in the ordinary power of sale. An enfranchisement is in fact merely a sale of the freehold to the copyholder instead of to a stranger.

(*c*) On this point a learned writer has observed, "A contrary doctrine has been advanced; and there is, it is believed, a decision to that effect, though frequent research has not discovered the case; but the principle on which this doctrine is maintained is not easily discovered; for, when the copyhold estate ceases, the estate under the freehold tenure must take effect in possession; and conveyancers have uniformly acted on such acceleration, and often guard against it by creating a term of years out of the copyhold tenure, prior to the enfranchisement, that the title to the possession may depend on that tenure:" 1 Prest. Abst. 302. See as to enfranchisements under the Copyhold Acts, *post*, p. 870.

Enfranchisement at Common Law.

Extinguishment.

Enfranchisement is a particular case of *extinguishment* (*d*) of a copyhold, distinguished from other cases of extinguishment only by the circumstance that the copyholder acquires in lieu of his copyhold estate some estate of freehold. Extinguishment is the union of the common law and customary titles in the same person. Some extinguishments destroy the tenure irretrievably and for ever; others are only temporary or avoidable. If the extinguishment happen by an escheat or surrender of the copyhold to the lord, the lands remain parcel of the manor and subject to the custom, and may at any future time be re-granted or re-demised to hold by copy as before; but if once the particular lands become separated from the manor during the extinction, or rather suspension of the tenure, they can never afterwards be granted to hold by copy, unless by a lord, who, claiming as remainderman or by title paramount, is not bound by the acts of the former lord, or where the extinguishment has arisen from a union of the interests in different rights, as where the lord or lady marries a copyholder: *Anon.*, Cro. Eliz. 8; *Conesbie* v. *Rusky*, Cro. Eliz. 459; *Bingham* v. *Woodgate*, 1 Russ. & M. 32. See 5 Mau. & S. 155. Thus, if the lord, being seised in fee, enfeoff a stranger of the particular lands in fee, and the copyholder surrender to the use of the feoffee, the demisable quality of the copyholds is gone for ever; and as the customary estate cannot pass without the assent of the lord, it should seem that the same effect would be produced by a surrender to the use of his lessee for life or years, as it would where, the copyhold having been got into the hands of the lord himself, he makes a lease for life or years to a stranger: *Lee* v. *Boothby*, Cro. Car. 521. The doctrine is thus laid down and illustrated in *French's case*, 4 Rep. 31:—

French's case.

"It was adjudged, that, if a copyhold estate is

(*d*) The term *extinguishment* is frequently used in a more restricted sense to denote the transfer of a copyhold interest from the tenant to the lord, as distinguished from *enfranchisement*, which is the transfer of the lord's interest to the tenant. See Scriven on Copyholds, 276.

Enfranchisement at Common Law.

What is a permanent extinction of the tenure.

forfeited to the lord, or escheats, or otherwise comes to the lord's hands, if the lord makes a lease for years (*e*), or for life, of the estate, by deed or without deed, that this land can never after be re-granted by copy, for the custom is destroyed, because during such estates the land was not demised nor demisable by copy of court-roll. So, if the lord makes a feoffment in fee thereof upon condition, and afterwards enters for the condition broke, yet it can never be re-granted by copy; but if the lord keeps the land in his hands for a long time, or lets it *at will*, he, his heirs or assigns, may well re-grant it at his pleasure. So, if the interruption is wrongful, as if the lord is disseised, and the disseisor dies seised, or if the land is recovered against the lord by false verdict or erroneous judgment, in these cases, till the land is recovered or the judgment reversed by the lord of the manor, the land was not demised or demisable, and yet after the land is re-continued, it is grantable again by copy; for *non valet impedimentum quod de jure non sortitur effectum; et quod contra legem fit pro infecto habetur:* but if the land so forfeited or escheated before any new grant made is extended upon a statute or recognizance acknowledged by the lord, or if the wife of the lord in a writ of dower has this land assigned to her, although these impediments are by acts in law, yet, inasmuch as the interruptions are lawful, the lands can never after be granted by copy. If a copyholder accepts a lease for years of the lord of his copyhold, the copyhold is destroyed for ever, and can never be re-granted again. If the copyholder takes a lease for years of the manor, by *that* his copyhold has not continuance, as it was adjudged: Pasch. 17 Eliz., in *Hide's case*, 2 Rep. 17 a; but in the same case it was resolved that such lessee might re-grant the copyhold again to whom he would, for the land was always demised or demisable. And if a copyhold is surrendered to the lessor of the manor, or is forfeited to him, he or his executors or assigns may well re-grant it; and if a copyhold escheats to the lord, and he aliens *the*

(*e*) See *Lane's case*, 2 Rep. 17.

Enfranchisement at Common Law.

manor by fine, feoffment, or otherwise, his alienee may re-grant the land by copy, for it was always demised or demisable." See *Revell* v. *Jodrell*, 2 T. R. 415.

Effect of conveyance of the freehold by the lord to a stranger.

To what extent the alienation of the freehold by the lord of the manor shall affect the copyholder, is not clear. It is settled, that it shall not prejudice the title of the copyholder and his heirs: *Lane's case*, 2 Rep. 166; *Bell* v. *Langlye*, 4 Leon. 230; or the dower of his wife: *Waldoe* v. *Bertlet*, Cro. Jac. 573; Hob. 181. In *Murrel* v. *Smith*, 4 Rep. 24, the Queen, being seised of the manor of B., granted parcel of it, being ancient copyhold, to S. in fee, and afterwards granted the freehold inheritance of the said copyhold to a stranger in fee. Afterwards, S. surrendered the copyhold to the Queen, to the use of his will. The heir having entered, it was held, in trespass by the devisee, that the surrender was inoperative. It is said to have been resolved: 1. That custom has so established the estate of a copyholder, that, by the severance of the inheritance of the copyhold from the manor, the copyhold is not destroyed, for, inasmuch as the lord cannot oust the copyholder, no more can any one claiming under him do it. 2. That in this case the copyhold descended to the heir, and the surrender was void, because the lands were not parcel of the manor at the time. 3. That after the severance the copyholder shall pay his rent to the feoffee, and also shall pay and do other services which are due, without admittance or holding of any court, as to plough the lord's demesnes, heriot, &c. But suit of court, and fine upon alienation or admittance, are gone, *for now the land or tenement cannot be aliened:* Co. Cop. s. 37; *Howard* v. *Bartlet*, Hob. 181; for as the copyholder has some benefit by this severance, so he has great prejudice, for now he cannot surrender or alien his estate. And it was held that forfeitures for waste, making a feoffment, lease, &c., might still be incurred: *East* v. *Harding*, Cro. Eliz. 499. See Gilb. Ten. 208; *Beale* v. *Langley*, 2 Leon. 208.

Murrel v. *Smith*.

After the freehold is severed, copyholder cannot surrender or alien his estate.

Melwich v. *Luther*.

In *Melwich* v. *Luther*, 4 Rep. 26; Cro. Eliz. 102, how-

ever, the law is laid down quite differently. A manor belonging to a monastery having come to the King's hands, he granted the inheritance of all the copyholds of the manor in E. to J. O. and his heirs, who called it his manor of E. One of the tenants having surrendered his tenement to J. O., the latter granted it by copy to the lessor of the plaintiff, and it was held that this grant bound those claiming under J. O. It was resolved, that, where the lord of the manor, having many ancient copyholds in one town, see *Harris* v. *Nicholls*, Cro. Eliz. 19, grants the inheritance of all the copyholds to another, the grantee may hold court, take surrenders, and make admittances and grants, though, for want of freeholders, it is no manor at law. And Lord Coke adds, "Nota, reader, although the lord by his own act cannot make of one and the same manor at the common law sundry manors consisting upon demesnes and freeholders, yet he may by his own act, as by this judgment appears, make a customary manor consisting upon copyholders only, as to the purposes aforesaid." In the report in Croke, the judges are made to say, that he who hath the freehold may keep a court in any place, and it is not properly a court-baron, but is a court of survey, at which copyholds may be well granted. The reporter adds, that the case was compounded, but the judges in the Exchequer Chamber were clearly of opinion that the copyholds were no longer demisable. If by a grant of all the copyholds in one town this may be done, there can be no reason or principle why it should not be done by a grant of a single copyhold; for, although the *steward* could not (before the stat. 4 & 5 Vict. c. 35, s. 88), admit out of court, or out of the manor, *Doe* d. *Roberts* v. *Whitaker*, 3 Nev. & M. 225, the lord might always have done so; and, besides, the lord or steward alone could constitute a court, at least for the purposes of alienation, although there might be no copyholders present, or even in existence. See Co. Litt. 58 a.; 4 Rep. 26; Gilb. Ten. 250; 4 T. R. 445. However, in *Neale's case*, 4 Rep. 26; *Jackson* v. *Neale*, Cro. Eliz. 395, where it was

Enfranchisement at Common Law.

Grantee of the freehold of many copyhold tenements may take surrenders and make regrants by copy.

Neale's case.

Enfranchisement at Common Law.

held that a lessee for years of all the copyholds in a manor might hold courts, Coke says, "Nota, reader, a good difference between these cases, which consist upon numbers of copyholds which may support a custom, and one single case of a copyhold, as in *Murrel's case*, in which the lord did not grant tacite any customary court, nor the grantee, having but one single copyhold, cannot hold court." Croke states the case as of a demise of *two* of the copyholds only, and of the court-baron, reserving the other demesnes and services.

In *Lord Davies' case*, 1 Leon. 280, per *Ayliff*, J., "If the lord of a manor makes a feoffment of a parcel of his manor, which is holden by copy for life, and afterwards the copyholder dieth, although now the lord hath not any court, yet the feoffee may grant over the land by copy again."

Bright v. *Forth*.

Distinction as to copyhold for lives.

In *Bright* v. *Forth*, Cro. Eliz. 443, the Court said that *Melwich* v. *Luther* was a strange judgment, never entered, and disapproved of in error. But they took a distinction between copyholds for lives, which they held were clearly not grantable after a severance, and copyholds of inheritance, as to which the judges differed, some appearing to think that they might be surrendered and re-granted, others, that they must remain in the copyholder and his heirs. But as *Anderson* and *Beaumont*, JJ., are represented as agreeing that a lord cannot take a surrender out of court, the accuracy of the report may well be questioned.

Whether copyholder for a particular estate can destroy the tenure for ever.

"If a copyholder in fee surrender to the use of the lord for life, the remainder over to a stranger, or reserveth the reversion to himself, if the lord will grant this by copy in fee, whatsoever estate the lord hath in his manor, yet, having but an estate for life in the copyhold, no larger estate shall pass:" Co. Cop. s. 34. It follows from this, by necessary inference, that, if the owner of a particular estate in a copyhold surrender to the lord, or to the lord's grantee of the freehold in that tenement, the copyhold shall be extinguished only during the particular estate; and the rule that contingent remainders in a copyhold cannot be destroyed by any surrender or

Enfranchisement at Common Law.

other act of the particular tenant entirely accords with this conclusion. Hence it should follow, that, if the lord release the seignory or the freehold to the particular tenant, this shall only be an extinguishment or an enfranchisement *pro tanto*. Thus, if A. is tenant for life of a copyhold, remainder to B. in fee, and the lord grant the freehold to A. and his heirs, upon A.'s death the freehold shall descend to his heir, and B. shall be entitled under the custom. But, if the grant had been to A. for his life, remainder to B. in fee (following the limitations of the copyhold), then on A.'s death B. might either have assented to the limitation to him, and so have completed the enfranchisement, or he might have disclaimed the estate and resorted to his copyhold. So, if A. had been tenant in tail special by the custom, and the grant of the freehold had been to him and his heirs general, here, if the custom allowed of a bar by surrender merely, it might well be contended that the enfranchisement was equivalent to a surrender for that purpose; and since the stat. 3 & 4 Will. 4, c. 74, a surrender is sufficient to bar a legal entail in copyholds notwithstanding any custom. But before that Act, where the custom allowed of a bar only by recovery in the lord's court, it was said that the enfranchisement was necessarily a bar of the entail, because otherwise there would be a perpetuity, as no customary recovery could be suffered after the severance: *Dunn* v. *Green*, 3 P. Wms. 9; *Parker* v. *Turner*, 1 Vern. 393, 458; 2 Ch. Ca. 174, in which case, however, the claim was by the issue, who appear to have been excluded by a fine levied at common law after the enfranchisement.

M. Podger's case. Enfranchisement to tenant for life held not to destroy the copyhold remainders.

The above deductions from principle are supported by the resolutions in *M. Podger's case*, 9 Rep. 104, where a copyhold was demisable for lives, to go to the persons named in succession, and having been granted in that manner to John Podger and Elizabeth and Mary, his daughters, for their lives; and John being in possession took from the lord a bargain and sale of the freehold to him and his heirs, and afterwards the lord levied a fine with proclamations to the use of John, and after John's death his heir

Enfranchisement at Common Law.

levied a fine. It was held, that copyholds were within the Statute of Fines; but that the bargain and sale and fine to John did not divest the estates in remainder of his daughters, so that they might enter after his death. And it was resolved (though not necessary for the determination of the case) that after the bargain and sale Elizabeth could not enter during the life of J., for her estate was to commence in possession after his death, by the custom. And so, if a copyholder for life, where the remainder is for life, commit a forfeiture, he in the remainder shall not enter, but the lord and he shall retain it during the life of him that committed the forfeiture; but that shall not destroy the remainder without an express custom in such case. See *Doe* d. *Beadon* v. *Pyke*, 5 Mau. & S. 154.

Bernard v. *Simpson.* Entail not barred by enfranchisement.

Again in *Bernard* v. *Simpson*, Clayt. 138, a copyholder in tail having procured an enfranchisement, it was thought that his heir might nevertheless plead *riens per discent;* but the defendant being proved to have other freeholds by descent, the point was not decided. In *Taylor* v. *Shaw*, Carth. 622, a tenant in tail of a copyhold was held to have barred his issue by the combined effect of an enfranchisement and a fine, but not by the enfranchisement simply.

Wynne v. *Cookes.* Enfranchisement to tenant for life held, in equity, to be for the benefit of those in remainder.

In *Wynne* v. *Cookes*, 1 B. C. C. 515, A. devised freeholds and copyholds to B. for life, with remainder to C. in tail, with remainder over. B. took an enfranchisement of the copyholds to himself in fee; after his death C. suffered a recovery of all the estates devised by A. It was held by *Eyre*, B., that this recovery did not bar the entail in the copyhold, and he decreed, that, on repayment of the consideration for the enfranchisement, B.'s devisee should convey the estate to the uses of A.'s will. It seems, therefore, to have been assumed, that the copyhold remainders were destroyed, and were not replaced by estates at common law. The first member of this conclusion, however, is directly contradicted by the resolution in *M. Podger's case*, *supra*.

Challoner v. *Marshall.* Entail held to be barred by

In *Challoner* v. *Marshall*, 2 Ves. jun. 524, copyholds were settled to the use of A. for life, remainder to his eldest son B. in tail. The lord conveyed the

fee-simple to A., who died intestate as to that estate. By the custom entails were barrable by surrender. It was held, that the entail was extinct. Lord *Loughborough* said, "It is impossible that any equity could keep alive this entail. No one could have a right against the tenant in tail. The case by Lord *Jefferies* proves a plain proposition—that where the interest of the lord in the manor is united with the copyhold in tail, there must be a merger, for the method of barring it cannot exist." In his lordship's opinion, therefore, it was the descent of the freehold on the tenant in tail, and not the act of the tenant for life, that barred the entail.

Enfranchisement at Common Law.

enfranchisement.

In *Roe* d. *Clemmett* v. *Briggs*, 16 East, 406, a burgage tenement, held of a manor in which there did not appear to be any custom of entailing, was devised to the testator's wife during widowhood, remainder to R. C. his youngest son for life, remainder to the heirs of the body of R. C. living at his death, as tenants in common, and in case he should die without issue, remainder over. It was held, that R. C. took either a conditional fee, or an estate for life with a contingent remainder to his child or children living at his death; and also, R. C. and the testator's heir having, after the birth of a son, by a customary assurance, conveyed all his estate to T. and his heirs, and one claiming under T. having, in the lifetime of R. C., taken an enfranchisement by feoffment, that the claim of the son of R. C. was defeated. With reference to the effect of enfranchisement, Lord *Ellenborough*, C. J., observed, "By the enfranchisement the estate becomes severed from the manor, though the person to whom the enfranchisement is made has only a particular estate in the premises, and he takes a conveyance of the freehold in fee, it shall be an absolute enfranchisement; the copyhold tenure shall be extinct for ever, and the enfranchisement shall enure for the benefit of those in remainder, that is, their estate shall cease to be held of the manor, and shall become of freehold tenure. After the enfranchisement, the premises being severed from the manor, and the tenure changed, all customs, and all rights and

Roe d. *Clemmett* v. *Briggs*.

Contingent remainders held destroyed by enfranchisement to the tenant for life.

Enfranchisement at Common Law.

privileges which before attached to their customary tenure, ceased with respect to them."

Doe d. *Newby* v. *Jackson*.

In *Doe* d. *Newby* v. *Jackson*, 1 B. &. C. 448, a *feme* copyholder in fee, after admittance, married, and her husband purchased the freehold of the lord, and took a conveyance to himself and his heirs by deed of feoffment and livery, in which deed the title of the wife was recited. The husband died, and afterwards the widow, leaving two sons of the marriage, the eldest of whom acquired seisin, and died without issue. The Court leaned to the conclusion that the estate descended to the heir *ex parte maternâ*.

Wilson v. *Allen*.

Enfranchisement to *cestui que trust* of the freehold good in equity.

Lastly, in *Wilson* v. *Allen*, 1 Jac. & W. 611, a suit for specific performance, the enfranchisement was taken by a *cestui que trust*, who had been admitted, but in whose favour it did not appear that the trustee had made any surrender. Sir *T. Plumer*, M. R., thought there was strong ground for presuming a surrender, but added, that, as the beneficial owner had accepted the enfranchisement, his trustee could not object, and if necessary his heir must join; so that it was a question of conveyance, and not of title.

Remark on the cases.

The result of the foregoing cases appears to be that if a copyholder, having only a limited interest, takes an enfranchisement, it will, in equity, enure for the benefit of those who, but for the enfranchisement, would have taken the copyhold in remainder; but it would seem to occasion the inconvenience of leaving in his heir-at-law the legal state of inheritance in the freehold: Shelford, Cop. 251. It is therefore advisable, where either the lord or the copyholder has a limited estate, that enfranchisement should be effected under the provisions of the Copyhold Acts.

Rights of common extinguished by enfranchisement.

Immediately on the lands being enfranchised in fee, they become severed from the manor, and held of the lord above, under the same tenure and services as the former or mesne lord held; therefore, all rights and privileges annexed to the copyholder's estate, as such, must be done away, as the estate by copy, to which they attached, has ceased to

exist(*f*); thus, if a copyholder has common of pasture or estovers in right of his copyhold, and the copyhold be enfranchised, the common is gone, since the copyhold is gone in right of which it was claimed: *Dawson* v. *Hunter*, Noy, 136. It is therefore usual and proper to insert in a deed of enfranchisement, intended to operate by the common law, an express re-grant of all commonable rights(*g*). Enfranchisement at Common Law.

Rights of common outside the manor belong to the land, and not to the copyholder's estate, and accordingly are not destroyed by enfranchisement: *Fort* v. *Ward*, Moore, 667; *Worledge* v. *Kingswel*, Cro. Eliz. 794; 2 And. 168; *Crowder* v. *Oldfield*, Salk. 170, 366; Holt, 146; *Barwick* v. *Matthews*, 5 Taunt. 375; 1 Marsh. 50; *Speaker* v. *Styant*, Comb. 127; *Styant* v. *Staker*, 2 Vern. 250. A grant of all appurtenances to the copyhold estate does not include the common: *Bradshaw* v. *Eyre*, Cro. Eliz. 570; *Marsham* v. *Hunter*, Cro. Jac. 253; *Lee* v. *Edwards*, 1 Brownl. 173. But the right of common is not destroyed in equity by an enfranchisement, if the intention appear to have been that it should be preserved: *Styant* v. *Staker*, 2 Vern. 250. See *Lanesborough* v. *Ockshott*, 1 Br. P. C. 151; Com. Dig. *Copyh.* (K. 6); 2 Eq. Ab. 104, pl. 10 (*h*). It seems that a grant, in general terms, of all commons belonging to an estate would not operate as a new grant of the common formerly but not then appurtenant to it: *Fort* v. *Ward*, Moore, 667; *contra*, where the grant is of all commons belonging to the estate, and theretofore usually enjoyed therewith: *Worledge* v. *Kingswel*, Cro. Eliz. 794. Rights of common outside manor.

(*f*) No services can be reserved upon an enfranchisement since the stat. *Quia emptores;* and if a rent is stipulated for, it is a rent-charge only, and not a rent-service: *Bradshaw* v. *Lawson*, 4 T. R. 443. See *Doe* d. *Reay* v. *Huntington*, 4 East, 271; *Moore* v. *Lord Plymouth*, 7 Taunt. 618. Quality of rent reserved on enfranchisement.

(*g*) A grant of all "appurtenances" to the copyhold lands will not preserve the commonable rights: Gilb. Ten. 292, 5th ed. Commonable rights continue in the case of an enfranchisement under the Copyhold Acts: see *post*, p. 876. Grant of appurtenances.

(*h*) So, where there is a merely temporary extinguishment or suspension of the copyhold, the right of common is, of course, not permanently destroyed, and will revive upon a new grant of the copyhold being made: *Badger* v. *Ford*, 3 B. & Ald. 153. Temporary extinguishment of copyhold.

Enfranchisement at Common Law.

The effect of enfranchisement being that the estate is no longer copyhold, or even held of the manor, all customs relative to copyholds within the manor fail as to the premises enfranchised; thus a grant of the freehold to a copyholder was held to destroy the custom of freebench, "but if the lord had enfeoffed a stranger of that land, yet the land remained copyhold, and the custom is not taken away:" *Lashmer* v. *Avery*, Cro. Jac. 126. See also *Waldoe* v. *Bertlet*, Cro. Jac. 573; Hob. 181; *Murrel* v. *Smith*, 4 Rep. 24.

In order effectually to extinguish the copyhold interest and its customary incidents, the conveyance by way of enfranchisement should therefore always be made to the copyholder direct, and not to a stranger in trust for him: *ante*, p. 859.

Presumption of enfranchisement.

After payment of rent for twenty years, a grant of the freehold of the copyhold from the lord of the manor was presumed: *Steward* v. *Bridger*, 2 Vern. 516. And an enfranchisement will be presumed after long possession, even against the Crown: *Roe* d. *Jobson* v. *Ireland*, 4 East, 280. See *Turner* v. *West Bromwich Union*, 9 W. R. 155; 3 L. T., N. S. 662.

Statutory enfranchisement.

Statutory Enfranchisement under the Copyhold Acts.]—Enfranchisements are now usually carried into effect by virtue of the Copyhold Acts, viz., the Copyhold Act, 1841 (4 & 5 Vict. c. 35); the Copyhold Act, 1843 (6 & 7 Vict. c. 23); the Copyhold Act, 1844 (7 & 8 Vict. c. 44); the Copyhold Act, 1852 (15 & 16 Vict. c. 51); and the Copyhold Act, 1858 (21 & 22 Vict. c. 94). Under these Acts an enfranchisement may be effected voluntarily by means of a deed embodying the terms agreed upon between the parties, or compulsorily by an award of the Land Commissioners (*i*).

(*i*) By the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 48, it is enacted that the Commissioners now bearing the three several styles of the Inclosure Commissioners for England and Wales, and the Copyhold Commissioners, and the Tithe Commissioners for England and Wales, shall, by virtue of this Act, become and be styled the Land Commissioners for England.

Voluntary Enfranchisement under Copyhold Acts.

Voluntary Enfranchisement under the Copyhold Acts.] —By the Copyhold Acts of 1841, 1843, and 1844, the lord of a manor, whatever may be his estate or interest, is empowered, with the consent of the Land Commissioners, to grant, and the tenant, whatever may be his estate or interest, is empowered to accept, an enfranchisement.

Voluntary enfranchisement under the Copyhold Acts.

By the Copyhold Act, 1841 (4 & 5 Vict. c. 35), s. 56, it is enacted:—

Powers for lords and tenants to effect enfranchisements by agreement (*k*).

"That for the purpose of enabling lords and tenants of manors to effect either general or partial enfranchisements, it shall be lawful for the lord of any manor, whatever may be his estate or interests therein, with the consent of the said commissioners under this Act, at any time or times after the passing of this Act, to enfranchise all or any of the lands holden of his manor, in consideration of such sum or sums of money, whether payable forthwith or at a future time, as shall be agreed to be paid by the tenant or tenants whose lands are to be enfranchised; and it shall be lawful for any tenant, whatever may be his estate or interest, with the like consent of the said commissioners under this Act, to accept such enfranchisement on the terms so agreed on; and where any compensation shall have been agreed to be paid to the steward or other officers of the manor for the loss he or they may sustain by such enfranchisement, which compensation shall in all cases be provided for where a steward shall hold his office by patent or other instrument for the term of his life or during good behaviour, or where, in the absence of such patent or other instrument, the usage shall have been such as in the opinion of the said commissioners to lead to a just expectation that the steward will hold his office during life or good behaviour, the schedule shall contain an apportionment of the sum agreed to be paid (*k*); [and every such schedule shall contain all such other matters as shall be requisite for carrying into effect the provisions of this Act; and all the provisions hereinbefore contained for carrying into execution a commutation apportionment made by valuers shall, so far as the same are capable of application, be deemed and taken to be applicable to the case of an enfranchisement under the provisions herein contained, save that the said commissioners shall not make any alterations or amendments in such schedule without the consent of the parties inte-

(*k*) Agreements and powers of attorney under this Act are exempt from stamp duty: 4 & 5 Vict. c. 35, s. 93. The words in brackets are repealed by the Stat. Law Rev. Act, 1874 (No. 2).

Voluntary Enfranchisement under Copyhold Acts.

rested therein;] provided always, that whenever the estate of any party to such enfranchisement shall be less than an estate of fee simple in possession, or corresponding copyhold or customary estate, notice in writing shall be given by or on behalf of such party to the person entitled to the next estate of inheritance in remainder or reversion in the manor or land to be affected by such enfranchisement, so that the assent or dissent or acquiescence of such person entitled in remainder or reversion may be stated in writing to the said commissioners, [when such a schedule of apportionment as aforesaid, or] when such conveyance, deed, or assurance as hereinafter mentioned, shall be sent to them, but the said commissioners shall notwithstanding cause such further notices to be given and such other inquiries to be made as they shall deem fit before [confirming such apportionment, or] consenting to such conveyance, deed, or assurance; provided also, that in case the person so next entitled in remainder or reversion as aforesaid shall be a minor, idiot, lunatic, feme covert, or under any other legal disability, or shall be beyond the seas, such notice as aforesaid shall be given to the guardian, trustees, committee of the estate, husband or attorney of such person respectively, or in default thereof, or in case the person so entitled shall be unknown or not ascertained, then such notice shall be given to some person, to be nominated for that purpose by some writing under the hands and seal of the said commissioners, after due inquiry shall have been made by them as to the fitness of such person to judge of the propriety of assenting to or dissenting from any such agreement; and that in every case in which dissent in writing shall have been expressed, the commissioners shall withhold [their confirmation of the apportionment, or] their consent to the conveyance, deed or assurance hereinafter mentioned, until upon further inquiry they shall be satisfied that the agreement is not fairly open to objection."

Enfranchisement to be by deed.

Sect. 57. "That an enfranchisement may be effected, with the consent of the said commissioners, by such conveyance, deed or assurance as would or might be adopted for effecting such enfranchisement, if the lord were seised of the manor for an absolute estate of inheritance in fee simple in possession."

Enfranchisement when the lord or tenant is under disability.

As regards enfranchisements, where any of the parties are under any disability, sect. 11 of the same Act enacts—

"That whenever the lord or tenant of a manor, or any person interested in any question or right connected with any commuta-

Voluntary Enfranchisement under Copyhold Acts.

tion or enfranchisement under this Act, shall be a minor, idiot, lunatic, feme covert, or under any other legal disability, or shall be beyond the seas, the guardian, trustees, committee of the estate, husband or attorney of such person respectively, or in default thereof, or in case the party interested shall be unknown or not ascertained, then such person as may be nominated for that purpose by the said commissioners, under their hands and seal, after due inquiry shall have been made by them as to the fitness of such person, shall, for the purposes of this Act, be substituted in the place of such lord, tenant, or other person."

When the legal estate in copyholds to be enfranchised is vested in trustees, the enfranchisement should be made to them and not to the *cestui que trust: Minton* v. *Kirwood*, L. R., 3 Ch. A. 614.

Consideration for enfranchisement.

The consideration for an enfranchisement may be either a sum or sums of money payable forthwith or at a future time (Copyhold Act, 1841, sect. 56, *supra*), or a rent-charge, or a conveyance of lands, mining rights, &c., under sect. 1 of the Copyhold Act, 1843, which enacts that, in addition and subject to the provisions of the former Act,—

Enfranchisement in consideration of annual rent, &c.

"Any enfranchisement made under the same may be made either wholly or in part for the consideration of a grant of an annual rent in fee to be thenceforth charged on and issuing out of the lands enfranchised, such annual rent to be valued in like manner and be subject to the like variation as the commutation rent-charge under the provisions of the said Act; and that, in addition and subject to the provisions contained in the said Act, any commutation or enfranchisement made under the same may be made either wholly or in part for the consideration of a conveyance of lands, parcel of the same manor as the lands commuted or enfranchised, and subject to the same uses and trusts as the lands commuted or enfranchised shall be subject to at the time of such commutation or enfranchisement, or any right to mines or minerals in or under such lands, or any right to waste in lands belonging to such manor."

And by the second and third sections of the same Act, a person obtaining an enfranchisement is empowered, in consideration of such enfranchisement, to grant an annual rent, and to convey lands or rights to mines, minerals or waste to the person enfranchising and his heirs "to the uses, and upon and for the trusts, intents and purposes to, upon and

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for which the manor of which such lands are parcel, shall be subject and held at the time of such enfranchisement." The annual rent is to be a rent service, and may be granted by deed or by a schedule of appointment, pursuant to the directions of the Act.

And by the Copyhold Act, 1844, sect. 5, the enfranchisement may be made in consideration of a conveyance of lands, &c., not parcel of the manor, but convenient to be held therewith, which are to be similarly settled to the uses and trusts affecting the manor.

To whom the consideration is to be paid.

In the case of a settled manor, where the consideration for the enfranchisement is a gross sum, the money is to be paid to the lord of the manor if he is seised in fee simple in possession; but if the lord has only a limited interest, or is under disability, then, at the option of the parties for the time being entitled to the manor, or of their respective husbands, guardians, or committees in case of disability, the money is to be paid into the Bank of England, under the statute 1 Geo. 4, c. 35, there to remain till paid out on petition to be presented to the persons absolutely entitled, or to the trustees of the settlement, or (if there be no such trustees) to trustees to be nominated by the commissioners; in either case, the money is to be applied in the purchase or redemption of land tax or discharge of incumbrances affecting the manor or other lands settled therewith, or in the purchase of other lands to be settled to the same uses. See 4 & 5 Vict. c. 35, s. 73; 6 & 7 Vict. c. 23, s. 14; and 15 & 16 Vict. c. 51, s. 39. The consideration, until paid to the person entitled to receive it, continues charged on the enfranchised lands: Copyhold Act, 1841, sect. 76. The consideration money, or the value of lands conveyed as consideration for enfranchisement may, with the consent of the commissioners, be charged upon the enfranchised lands: 21 & 22 Vict. c. 94, ss. 21, 22.

Consideration money may be charged on land enfranchised.

With regard to the investigation of the lord's title and the expenses of the enfranchisement, it is enacted by sect. 58 of the Copyhold Act, 1841, as follows:—

Voluntary Enfranchisement under Copyhold Acts.

"That in every case in which any such agreement for enfranchisement shall be so entered into, and shall be proposed to be carried into effect by a schedule of apportionment, the said commissioners, before they shall signify their consent thereto, shall, upon the written request of any three or more tenants parties to the agreement, but not otherwise, satisfy themselves in such way and by such evidence as they shall see fit of the title of the lord of the manor; and the expense of investigating the title to the manor, and the other expenses attending every such agreement, whether carried into effect by a schedule of apportionment or otherwise, and the confirmation thereof, and the schedule of apportionment (if any) shall be borne by the lord and tenants parties to such agreement in such proportions as they may agree, or in default of agreement as the said commissioners may direct: Provided always, that the expenses payable by the lords of manors having particular interests or being trustees shall, with any other expenses they may reasonably incur in or about any such agreement (the amount of such last-mentioned expenses being subject to the approval of the said commissioners), be paid out of the first moneys to be received out of the enfranchisements to be effected under this Act: Provided always that if the lord shall refuse to afford such information as may enable the commissioners to be satisfied of his title, or if the commissioners shall, for any other reason, not be satisfied of such title, the said agreement so entered into shall be null and void" (*l*).

Commissioners to satisfy themselves as to title and expenses (*k*).

Sects. 65 to 67 of this Act provide for the expenses of valuations, &c., and for the mode of recovering the costs of an enfranchisement. Trustees and limited owners may charge such costs upon the settled land for such period as the parties may agree and the commissioners may approve, not exceeding fifteen years, and at such interest as stated in the certificate of charge: 21 & 22 Vict. c. 94, s. 27.

(*k*) This section is repealed so far as relates to the schedule of apportionment: Stat. Law Rev. Act, 1874 (No. 2).

(*l*) It is not the general practice of the Land Commissioners to cause the lord's title to be investigated by counsel appointed by themselves, but they require the opinion of a conveyancer or (in small matters) of a solicitor that the title is such as to empower the lord to effect a voluntary enfranchisement; they also require to be furnished with such statutory declarations with regard to the identity of persons or parcels and other matters as may seem necessary.

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By the Copyhold Act, 1841, s. 64, it is enacted,—

"That all lands which shall be enfranchised under this Act shall be deemed to be held under the same title as that under which the same were held at the time of such enfranchisement, and shall not be subject to any estates, rights, titles, interests, incumbrances, claims, or demands affecting the manor of which the same were holden."

Title after enfranchisement.

Custom of gavelkind.

By sect. 80, the custom of gavelkind is expressly exempted from the operation of the Act, and by sect. 81 it is enacted,—

Lands to become freehold subject to the payment of the enfranchisement consideration.

"That in case of any enfranchisement under this Act, from and after the final confirmation of the apportionment, or the execution of the conveyance (as the case may be), the several lands therein respectively comprised and enfranchised shall become and be in all respects of freehold tenure (*m*), but subject to the payment of the enfranchisement consideration in favour of the lords or steward, or other officer as aforesaid: and all mortgages affecting the same shall be deemed and become mortgages of the freehold of the same lands for a corresponding estate, if such enfranchisement consideration shall be paid off, and if not so paid off, mortgages of the equity of redemption thereof, subject to such mortgage interest as aforesaid for securing such consideration; Provided always, that nothing herein contained shall operate to deprive any tenant of any commonable right to which he may be entitled in respect of such lands, but such right shall continue attached thereto notwithstanding the same shall become freehold: Provided also, that no such enfranchisement or conversion into freehold shall affect, except as aforesaid, any mortgage, or defeat the beneficial limitations of any will or settlement theretofore executed, or alter the descent or distribution of any estate or interest in land on the decease of any tenant or person entitled thereto in possession or remainder at the time of such enfranchisement or conversion."

Commonable rights to remain.

Proviso for mortgages, wills, &c.

(*m*) The Court, on sanctioning proceedings for carrying into effect the enfranchisement of copyholds belonging to a lunatic, the rules of descent as to which were different from those as to the descent of freeholds, made a declaration that in the event of his dying intestate as to the enfranchised lands, his heir-at-law would stand seised thereof in trust for the persons who would have been entitled thereto as his heirs, according to the custom of the manor, if the lands had not been enfranchised: *Re H. D. Ryder*, 20 Ch. D. 514.

Voluntary Enfranchisement under Copyhold Acts.

Other rights of lord not to be affected.

Sect. 82. "That no commutation under this Act shall operate to affect any right of lords of manors to escheats, fairs, markets, appointments, franchises, royalties, rights, liberties and privileges of chase, and free warren, hunting, hawking, fowling, and of chasing and killing game, and beasts of chase and free warren, and all ancient piscaries, fisheries, and rights of fishing, or any rights in any mines and minerals, or quarries, within or under the said lands and hereditaments, or any other manorial rights whatever, unless expressly commuted under this Act; provided always, that nothing in this Act contained shall operate to authorize or empower any lord of any manor to enclose any common, or waste lands, or any part thereof."

No agreement, award, schedule of apportionment, or power of attorney, made or confirmed under these Acts is chargeable with stamp duty: 4 & 5 Vict. c. 35, s. 93.

The Acts do not extend to the Duchy of Cornwall: sect. 99; and extend to Crown manors, and to the Duchy of Lancaster only so far as expressly provided: sects. 97, 98.

Reversions on leases not affected by enfranchisement.

If at the time of the conveyance of any lands in consideration of an enfranchisement there is a lease subsisting in the lands so conveyed, the person to whom the lands are conveyed is to have the reversion on such lease, and may distrain for the rents, and enforce the covenants; and similarly, if at the time of the commutation or enfranchisement of any lands there is any lease subsisting in such land, the person seised of or entitled to the land so commuted or enfranchised is to be the reversioner, and may distrain, &c. See 6 & 7 Vict. c. 23, ss. 9, 10. And the enfranchisement is not to affect such subsisting leases: 15 & 16 Vict. c. 51, s. 44.

Compulsory Enfranchisement under the Copyhold Acts.] —Compulsory enfranchisements are effected under the provisions of the Copyhold Act, 1852, and the Copyhold Act, 1858, by means of an award of the Land Commissioners, without the necessity for any deed of conveyance. This subject will be here very briefly noticed.

By sects. 1 and 2 of the Copyhold Act, 1852 (15 & 16 Vict. c. 51), the tenant or lord of any copyhold lands, to which admittance has been taken

Compulsory Enfranchisement under Copyhold Acts.

within the meaning of the Act of 1852 (except lands held for a life or lives, or for years, where the tenant thereof has not the right of renewal), may require and compel the enfranchisement thereof, upon giving notice in writing (*n*) to the lord or tenant of his desire that the land shall be enfranchised. But no tenant may require enfranchisement unless he has, if admitted before the 1st of July, 1853, paid or tendered the fines payable on admittance, or if admitted after that date paid or tendered the fine, and the value of the heriot, and two-thirds of the steward's fees in respect of such admittance: see sect. 6 of the Copyhold Act, 1858 (21 & 22 Vict. c. 94). A surrenderee by way of mortgage is to be deemed a tenant for the purpose of obtaining an enfranchisement, and may add the expenses of the enfranchisement to his mortgage: 15 & 16 Vict. c. 51, s. 43. Where land is held in undivided shares, the owner of two-thirds in value of the rents and profits is to be deemed the tenant: 21 & 22 Vict. c. 94, s. 38. The provisions as to persons under disability, contained in sect. 11 of the Act of 1841 (*ante*, p. 872), apply to compulsory enfranchisements: see 15 & 16 Vict. c. 51, s. 53. An agent may be appointed by power of attorney to act

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(*n*) The following regulations as to notices are laid down in a minute, issued in 1877, by the Land Commissioners:—

Notices and appointments of valuers in cases of joint tenants, &c.

Where notices are given by joint tenants, tenants in common, or coparceners, they must all join in the notice if requiring enfranchisement, and must each be served with notice if required to enfranchise. They must join, also, in the appointment of valuer.

Notices and appointments of valuers where tenant is a widow, spinster, or married woman.

Where the tenant on the court rolls is a widow, or a spinster, it should so appear upon the face of the notice. Where the tenant on the rolls is a married woman, and the enfranchisement is at the instance of the lord, the husband must be included in the notice, and it must be served upon him; and when the enfranchisement is required by the husband and wife, they must join in the notice, and also, in both cases, in the appointment of valuer.

List of forms.

A list of the notices and other necessary forms may be obtained on application at the office of the commissioners.

Service of notices.

Notices to the lord may be served on the steward, and all notices may be sent by the post in a registered letter, or left at the office or usual place of abode of the person to be served.

Copies of notices, &c., to be sent to commissioners.

Copies of all notices or appointments should be sent to the commissioners immediately they are made.

Compulsory Enfranchisement under Copyhold Acts.

on behalf of the lord or tenant for the purposes of the Act: 21 & 22 Vict. c. 94, s. 39; such appointment requires no stamp.

Notice of desire to enfranchise to be given.

The lord or tenant requiring enfranchisement must give notice to the other party of his desire that the lands should be enfranchised, and send a copy of the notice to the commissioners, with an endorsement thereon, stating when and upon whom the notice was served, and how served.

The lord and the tenant may then agree upon the consideration to be paid for the enfranchisement (as to which see *supra*), subject to the approbation of the commissioners. In such case, however, a memorandum in writing of the agreement, signed by the lord and tenant, must be sent to the commissioners as the basis on which to frame their award of enfranchisement; and such agreement must expressly include or reserve the rights mentioned in sect. 48 of the Copyhold Act, 1852. A form of agreement may be obtained on application to the commissioners.

Where the lord and tenant desire to have the assistance of the commissioners, and agree upon all the circumstances that is to form the basis of the calculation of the amount to be paid as enfranchisement consideration (*o*), the commissioners will state their opinion as to the amount to be so paid.

The amount of the consideration, if the parties do not agree about the same, is to be ascertained under the direction of the commissioners, either by a single valuer, or by two valuers and their umpire: 15 & 16 Vict. c. 51, s. 7 (*p*).

(*o*) These circumstances are set out in a form containing a series of queries, a printed copy of which will be furnished on application to the commissioners.

(*p*) The following regulations are laid down in the Minutes of 1877, with regard to the appointment of valuers and their umpire, and as to the mode of procedure to be followed in the valuation:—

Appointment of valuers.

If the enfranchisement terms be not agreed upon, the consideration to be paid must be awarded by a valuer, valuers, or umpire, duly appointed in manner following; that is to say,

Where the manorial rights consist only of heriots, rents, reliefs, and licences at fixed rates to demise or fell timber,

Compulsory Enfranchisement under Copyhold Acts.

In making a valuation, the valuers are to take into account the facilities for improvement, customs of the manor, fines, heriots and other incidents of tenure, and all other circumstances of the case:

Matters to be considered in the valuation.

or any of these, or where the land to be enfranchised is not rated to the poor's rate at a greater amount than the net annual value of 20*l.*, the valuation is to be made by a valuer to be nominated by the justices at a petty sessions holden for the division or place in which the manor or the chief part thereof is situate. The valuer so appointed will award the consideration to be paid for the enfranchisement. But if the parties agree, without seeking the intervention of the justices, to recommend a person to the commissioners to be the valuer, then such person will be nominated by the commissioners. Moreover, either party may, upon paying the charges of his own valuer, and of the umpire, have the valuation made as is set forth in the next paragraph. The party intending to apply to the justices to appoint a valuer must give due notice of his intention so to do to the other party, and forward to the commissioners a copy of such notice, and also of the appointment by the justices, when such appointment has been made.

In all other cases the lord and tenant may agree to appoint the same valuer; otherwise the person who has given the notice of desire to enfranchise should appoint a valuer, in writing, and give notice thereof to the other party, requiring him by such notice to appoint his valuer. A copy of the valuer's appointment, and of the notice, should be sent to the commissioners—the time and mode of service of the notice being endorsed.

When the notice of the appointment of valuer has been received, the party on whom it has been served must, within twenty-eight days, appoint his valuer, and send a copy of the appointment (as notice thereof) both to the opposite party and to the commissioners.

In any case where, after notice to the lord or tenant (as the case may be) so to do, either party shall neglect or refuse for twenty-eight days formally to appoint his valuer, and give due notice of the appointment to the other party, the power of appointment is lost to the party so failing, and the commissioners, on being requested to do so, will appoint a valuer.

Valuers to appoint an umpire.

The valuers, within fourteen days after their appointment, and before they proceed, should appoint an umpire, to whom any points in dispute between them should be referred, and forward a copy of such appointment to the commissioners. If they fail to appoint, the choice, after an interval of fourteen days, devolves upon the commissioners, and the valuer for the party requiring the enfranchisement, immediately after the expiration of the fourteen days, should request the commissioners to appoint an umpire.

Valuers and

Before any valuer or umpire shall enter upon his valuation,

15 & 16 Vict. c. 51, s. 16. And accordingly the lord is entitled to compensation in respect of the advantage accruing to the tenant from the removal of restrictions on leasing, and other disabilities attending his estate: *Lingwood* v. *Gyde*, L. R., 2 C. P. 72. See also *Brabant* v. *Wilson*, L. R., 1 Q. B. 44; *Arden* v. *Wilson*, L. R., 7 C. P. 535.

Compulsory Enfranchisement under Copyhold Acts.

So, also, the lord of a manor has rights in respect

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he must, in the presence of a justice of the peace, make and subscribe the following declaration (*a*):—

Umpire to make declaration.

"I ——— do declare that I will faithfully, to the best of my ability, value, hear, and determine the matters referred to me under the Copyhold Acts.

Made and subscribed in the presence of ———

this ——— day of ———, 188—."

Each party should furnish his valuer with a description of the lands to be enfranchised, and also with the further information necessary to enable him to estimate the value of the lord's rights, but should either party neglect or refuse to do so, the valuers will proceed upon such information as they can otherwise obtain, and the person so failing or refusing must accept the consequences. The circumstances to be considered by valuers are mentioned in sect. 16 of the Act of 1852.

Each party to instruct his valuer.

Circumstances to be considered by valuers.

The valuers should then enter upon their valuation, and should they agree upon the consideration to be paid for the enfranchisement make their award—a form of which may be had on application to the commissioners. Such award must be forwarded to the commissioners, and the particulars of the same in writing (that is to say, a complete copy of the award including the schedule) be delivered to the lord or the steward, and to the tenant or his attorney, within forty-two days after the appointment of the valuers. Should the valuers, however, be unable to agree upon the consideration to be awarded, they must, before the expiration of the forty-two days, refer the matter to the umpire, whose duty it will then be to make the award, and furnish particulars of the same, as above mentioned, within forty-two days from the matter being referred to him.

Valuers to make award or to refer the matter to the umpire.

To every award should be annexed, by way of schedule, the exact description by which the lands are to be enfranchised; viz., the court roll description by which the tenant was admitted, with the language of such court roll description altered only so far as may be necessary to make the description suitable for a schedule. If, however, the parties should agree to a more modern description of the lands, in addition to the court roll description, then the schedule so agreed to should be signed by the steward of the manor, and by the tenant or his attorney.

Schedules to awards.

The schedule, carefully and properly prepared as here pointed out, should be sent to the valuers by the person requiring the enfranchisement, or his attorney.

(*a*) This declaration must be annexed to the award.

Compulsory Enfranchisement under Copyhold Acts.

of timber growing on his copyhold lands, for which he is entitled to claim compensation on a compulsory enfranchisement: *Reynolds* v. *Lord of Manor of Woodham Walter*, L. R., 7 C. P. 639. And where a copyhold tenant died after proceedings instituted by him for a compulsory enfranchisement, and before the confirmation of the award by the commissioners, it was held that the proceedings did not abate, but that the lord was entitled to have a new tenant on the roll, and to a fine on his admittance: *Myers* v. *Hodgson*, 1 C. P. D. 609.

Enfranchisement prejudicially affecting lord's mansion-house, &c.

If the effect of the enfranchisement is such as to affect prejudicially the enjoyment or value of the mansion-house, park, gardens, or pleasure grounds of the lord, he is empowered to buy up the tenants' interest in the land proposed to be enfranchised at a valuation: 15 & 16 Vict. c. 51, s. 25.

Compensation to steward.

The steward for the time being of a manor of which any lands are enfranchised under this Act is entitled to compensation for his trouble about the enfranchisement, and for the extinguishment of his office in respect of such lands: sect. 19.

Where the enfranchisement is effected at the instance of the tenant, the consideration is to be a gross sum of money; but where it is effected at the instance of the lord, it is to be an annual rent-charge issuing out of the lands enfranchised; but in any case the parties may, with the sanction of the commissioners, agree (*q*) that the compensation shall be a gross sum, or a yearly rent-charge, or a conveyance of lands to be settled to the same uses as the manor: 15 & 16 Vict. c. 51, s. 7. A rent-charge forming the enfranchisement consideration under this Act is to have priority over all incumbrances, other than tithe commutation charges, and drainage charges: 21 & 22 Vict. c. 94, s. 33.

To whom consideration moneys are to be paid.

The consideration will be paid to the lord, if absolutely entitled, on his receipt (*r*). But if the

(*q*) This agreement must in all cases accompany the award. See Minute of 1877.

(*r*) The payment of the enfranchisement money, where the consideration is a sum of money, and the production of the receipt, must precede the confirmation of the award. See Minute of 1877.

Compulsory Enfranchisement under Copyhold Acts.

title of the lord is not satisfactory (*s*), or if the lord has only a limited estate, or is under any disability, or refuses to accept, the enfranchisement moneys are, at the option of the person entitled to the manor (or those acting for him or her in case of disability), to be paid into Court, or to trustees to be applied in manner similar to that mentioned before with regard to moneys payable in respect of voluntary enfranchisements: 15 & 16 Vict. c. 51, ss. 22, 39; 21 & 22 Vict. c. 94, s. 13.

The consideration moneys payable as compensation for enfranchisement of lands holden of a charitable corporation may be paid to the official trustees of charitable funds: in the case of other corporations, to trustees to be nominated by the commissioners; and in the case of spiritual persons, to the Governors of Queen Anne's Bounty: 21 & 22 Vict. c. 94, ss. 15, 16, 17.

Award of land commissioners.

After the valuation has been made, or upon receipt of the agreement of the parties fixing the consideration, the commissioners may, after such inquiries as they may think fit, make and confirm the award; and such award when confirmed effectually vests the enfranchised land in the tenant free from any estates, rights, titles to dower, and freebench, interests, incumbrances, claims or demands affecting the manor of which the lands are holden: 21 & 22 Vict. c. 94, s. 10. And see the repealed sect. 11 of the Act of 1852.

The award of enfranchisement (*t*), when confirmed, is proof that the prior proceedings were

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(*s*) The commissioners do not always themselves investigate the title of the lord to make the enfranchisement and to receive the money, but are generally satisfied with an opinion of a conveyancing counsel that such title is satisfactory, requiring also such statutory declarations as to pedigree, identity of parcels, and other matters as may seem necessary.

(*t*) Prior to the confirmation of the award, the commissioners will give notice to the parties of its receipt. Where the valuer's award is confirmed and registered, a copy will be sent to the steward of the manor for entry on the court rolls; and the commissioners will then prepare the award of enfranchisement. See Minute of 1877.

Compulsory Enfranchisement under Copyhold Acts.

regular, and is not liable to be impeached by reason of any omission, mistake, or informality therein, or any defect in the proceedings: 21 & 22 Vict. c. 94, s. 33. See also *Kerr* v. *Pawson*, 6 W. R. 447.

Effect of award.

Upon the confirmation of the award by the commissioners, the enfranchised lands become in all respects of freehold tenure, saving the custom of gavelkind: 15 & 16 Vict. c. 51, s. 34. The enfranchisement is not to affect previous leases or demises, or commonable rights, or rights under any settlements, wills, incumbrances, or otherwise in respect of the lands enfranchised: sects. 44, 45, 46. And the Act is not to extend to or affect the rights of any lord or tenant in respect of mines and minerals (*u*) without his express consent in writing (*x*): sect. 48. But the owners of enfranchised lands are at liberty to use and remove the soil for the purpose of making roads or drains, or other purposes connected with the enjoyment of the surface: 21 & 22 Vict. c. 94, s. 14.

The expenses (*y*) relating to enfranchisement are

Mining subsidence.

(*u*) The defendant, being owner of freeholds and copyholds adjoining, sold the copyholds, and, by deed of even date with the surrender, the purchaser covenanted with the vendor that the latter might work mines, &c. on the freeholds without making compensation for damage which might be thereby caused to the copyholds; this deed was not entered on the court rolls, nor referred to in the surrender; the copyholds were subsequently enfranchised and ultimately conveyed to the plaintiff, who had no notice of the covenant; the defendant having by his workings caused the plaintiff's land to subside, it was held that the deed of covenant afforded no defence to the action. The judges differed as to whether the defendant would have been liable if all the lands had originally been freehold: *Richards* v. *Harper*, L. R., 1 Ex. 199.

(*x*) Such consent, where both parties are willing that such rights should be extinguished, must be obtained and sent to the valuers before they enter on their valuation, in order that they may include the rights in question in the award. The consent (a form for which may be obtained from the commissioners) must be forwarded with the award to the commissioners: see Minute of 1877.

(*y*) The following is a table of the fees to be taken in respect of enfranchisements and other transactions under the Copyhold and other Acts in accordance with the provisions of the stat. 31 & 32 Vict. c. 89.

subject to the control and supervision of the commissioners.

Compulsory Enfranchisement under Copyhold Acts.

	£	s.	d.
On enfranchisements—			
Where the enfranchisement consideration money does not exceed the sum of .. £1	0	5	0
Exceeding £1 and not exceeding 5	0	10	0
,, 5 ,, 10	1	0	0
,, 10 ,, 15	1	10	0
,, 15 ,, 20	2	0	0
,, 20 ,, 25	2	10	0
,, 25 ,, 50	3	0	0
,, 50 ,, 75	3	10	0
,, 75 ,, 100	4	0	0
,, 100 ,, 125	4	10	0
,, 125 ,, 150	5	0	0
,, 150 ,, 175	5	10	0
,, 175 ,, 200	6	0	0
,, 200 ,, 250	6	10	0
,, 250 ,, 300	7	0	0
,, 300 ,, 350	7	10	0
,, 350 ,, 400	8	0	0
,, 400 ,, 450	8	10	0
,, 450 ,, 500	9	0	0
,, 500 ,, 550	9	10	0
,, 550 ,, 600	10	0	0
For every additional £100 or part of £100	0	10	0
Where the enfranchisement consideration is a rent-charge, the fee will be computed on the value of the rent-charge, calculated at twenty-five years' purchase.			
Where the enfranchisement consideration is land, the fee will be computed on the fee simple value of the land.			
Where the enfranchisement terms are fixed by the commissioners on agreed data, at the request of the parties, a fee of	1	0	0
On every certificate of charge on property enfranchised, a fee of	0	10	0
On every certificate fixing the sum of money in consideration of which a rent-charge may be redeemed, a fee of	0	10	0
On every consent by the commissioners to the application of enfranchisement money (or the stock in which it may have been invested) to the purchase of land. For every 50*l.* or part of 50*l.* expended	0	2	6
On every decision by the commissioners or an assistant commissioner, a fee of	2	0	0
On every award defining the boundaries of lands for the purpose of enfranchisement, a fee of ..	5	0	0
On the amendment of any award, or deed of enfranchisement or other instrument confirmed under the Copyhold Acts, a fee of	2	0	0

Enfranchisement by Ecclesiastical Corporations under Copyhold Acts.

Enfranchisement by Ecclesiastical Corporations under the Copyhold Acts.]—By sect. 4 of the Copyhold Act, 1858 (21 & 22 Vict. c. 94), the Copyhold Acts are not to extend to ecclesiastical manors where the tenant has not the right of renewal. But by sect. 5 of that Act, whenever it appears to the commissioners that an enfranchisement under the Copyhold Acts is one which might have been effected under the stat. 15 & 16 Vict. c. 104 (see *infra*), "and all the provisions of the said last-mentioned Act, which affect the application of enfranchisement moneys under that Act, shall be applicable to such enfranchisements as aforesaid made under the provisions of the Copyhold Acts." The consideration for the enfranchisement is to be paid in manner directed by that Act; but where an ecclesiastical corporation has only a reversionary interest in the manorial rights extinguished by the enfranchisement, the consideration is to be dealt with in manner directed by sect. 39 of the Copyhold Act, 1852, until but for the enfranchisement the reversionary interest would have fallen into possession, and is then, on petition, to be paid or transferred to the Ecclesiastical Commissioners as "persons absolutely entitled," within the meaning of that section.

Enfranchisement by ecclesiastical corporations.

Enfranchisements under the Ecclesiastical Estates Act, 1850.]—By the statute 14 & 15 Vict. c. 104, intituled "An Act to facilitate the Management and Improvement of Episcopal and Capitular Estates in England" (*z*),—

Power to ecclesiastical corporations, with the approval of the Church Estate Commissioners, to enfranchise, &c.

Sect. 1. "It shall be lawful for any ecclesiastical corporation, sole or aggregate, with the approval in writing of the Church Estates Commissioners....to enfranchise any copyhold or customary land held of any manor belonging to such corporation, or to exchange with any lessee under any lease granted by such corporation, all or any of the lands therein comprised, or the

(*z*) This Act was originally limited to three years, which period was extended by the stat. 17 & 18 Vict. c. 116, and has been continued, as amended by the latter Act, by successive Expiring Laws Continuance Acts.

reversion, estate, and interest therein of such corporation, for any other lands, whether of freehold or copyhold or customary tenure, or for the estate and interest of such lessee in any other lands belonging to such corporation, and upon any such exchange either to receive or pay any money by way of equality of exchange; and it shall also be lawful for any such corporation, with such approval as aforesaid, to purchase the estate and interest of any such lessee in any lands belonging to such corporation, or of any holder of copyhold, or customary land of any such manor."

Enfranchisements under Ecclesiastical Estates Act.

Sect. 5. "Any conveyance, assignment, or other assurance of lands to be made to or by any ecclesiastical corporation, upon any sale, enfranchisement, exchange, or purchase under this Act, shall be made in such form and manner as the Church Estates Commissioners shall from time to time direct (*a*), and shall be confirmed by the Church Estates Commissioners, and being so confirmed, shall be valid and effectual, and shall not require any other confirmation (as respects the execution of the same by any such ecclesiastical corporation); and no purchaser or other person deriving title under any such assurance so confirmed as aforesaid, upon any sale, enfranchisement, or exchange by any ecclesiastical corporation, shall be concerned to inquire into the propriety of such sale, enfranchisement, or exchange, or the sufficiency of the consideration for the same."

Confirmation of conveyances by Church Estates Commissioners sufficient.

Sect. 6. "All moneys which on any sale, exchange, or enfranchisement under this Act, shall be received by or become payable to or for the benefit of any ecclesiastical corporation, shall be paid into the Bank of England, to such account as the Church Estates Commissioners shall from time to time appoint in that behalf; or such moneys, with the approbation of the Church Estates Commissioners, shall remain at interest as a charge by way of mortgage upon the premises enfranchised at such a rate, for such a period and upon such terms as the parties, with such approbation as aforesaid, may agree upon; and the receipt of the Church Estates Commissioners shall be an effectual discharge for any money therein expressed to be received; and all moneys so paid into the Bank of England shall be, from time to time, applied in payment for equality of exchange as aforesaid, or in

Application of moneys to arise from enfranchisement, &c.

(*a*) Enfranchisements are very seldom effected under the provisions of this Act, and it does not appear that any form of enfranchisement deed has been prescribed by the Church Estates Commissioners. These sections are here set out because they are incorporated by sect. 5 of the Copyhold Act, 1858, under the provisions of which enfranchisements are at the present time not unfrequently effected: see *ante*, p. 886.

Enfranchisements under Ecclesiastical Estates Act.

such purchases as hereinbefore authorized, or shall be laid out by such corporation, with such approval as aforesaid, in the purchase of other lands to be conveyed to the use or for the benefit of such corporation; and the moneys from time to time remaining unapplied for the purpose aforesaid shall be invested by and in the names of the Church Estates Commissioners in the purchase of Government stocks, funds, or securities; and such Church Estates Commissioners may sell and dispose of the same for the purposes of this Act as occasion may require, and the interest, dividends, and annual proceeds of such moneys, stocks, funds, and securities shall be paid to the corporation which would, for the time being, have been entitled to the rents and profits of the lands sold, enfranchised, or exchanged, subject to the provisions herein contained."

And by the stat. 17 & 18 Vict. c. 116, intituled "An Act to Continue and Amend an Act to facilitate the Management and Improvement of Episcopal and Capitular Estates in England," *i. e.*, the Act of 1850, it is enacted:—

Trustees may raise money for enfranchisement.

Sect. 3. "In any case in which the legal estate and interest under any lease or grant made by any such ecclesiastical corporation may be vested in any person or persons in trust for any other person or persons, according to the limitations of any will or settlement, where such will or settlement contains a direction or power to such trustees to raise money for the purpose of procuring a renewal of such lease or grant, it shall be lawful for the same trustees to raise money for the purpose of purchasing the reversion of, or otherwise enfranchising, the property comprised in such lease or grant, in the same manner, and subject to the same conditions, *mutatis mutandis*, so far as the same may be applicable to the case, as may be specified in such will or settlement with reference to the raising of money for the purpose of renewing such lease or grant."

Enfranchisement upon a compulsory taking of Copyholds under the Lands Clauses Act, 1845.]—With respect to the acquisition, by railway and other public companies, of copyhold lands for the purposes of their works, the Lands Clauses Act, 1845 (8 & 9 Vict. c. 18), enacts as follows:—

Conveyances of copyhold lands to be enrolled.

Sect. 95. "Every conveyance to the promoters of the undertaking of any lands which shall be of copyhold or customary

tenure, or of the nature thereof, shall be entered on the rolls of the manor of which the same shall be held or parcel; and on payment to the steward of such manor of such fees as would be due to him on the surrender of the same lands to the use of a purchaser thereof (*b*), he shall make such enrolment; and every such conveyance, when so enrolled, shall have the like effect in respect of such copyhold or customary lands as if the same had been of freehold tenure, nevertheless, until such lands shall have been enfranchised by virtue of the powers hereinafter contained, they shall continue subject to the same fines, rents, heriots, and services, as were theretofore payable and of right accustomed" (*c*).

Enfranchisement under Lands Clauses Act.

Sect. 96. "Within three months after the enrolment of the conveyance of any such copyhold or customary lands, or within one month after the promoters of the undertaking shall enter upon and make use of the same for the purposes of the works, whichever shall first happen, or if more than one parcel of such lands holden of the same manor shall have been taken by them, then, within one month after the last of such parcels shall have been so taken or entered on by them, the promoters of the undertaking shall procure the whole of the lands holden of such manor so taken by them to be enfranchised, and for that purpose shall apply to the lord of the manor whereof such lands are holden to enfranchise the same, and shall pay to him such compensation in respect thereof as shall be agreed upon between them and him; and if the parties fail to agree respecting the amount of the compensation to be paid for such enfranchisement, the same shall be determined as in other cases of disputed compensation, and in estimating such compensation, the loss in respect of the fines, heriots, and other services payable on death, descent, or alienation, or any other matters which would be lost by the vesting of such copyhold or customary lands in the promoters of the undertaking, or by the enfranchisement of the same, shall be allowed" (*d*).

Copyhold lands conveyed to the promoters to be enfranchised.

Sect. 97. "Upon payment or tender of the compensation so

Lord of the manor to en-

(*b*) A steward, entitled by the custom of the manor to one fee on surrender, and to another fee on admittance, is only entitled under this section to the single fee payable on surrender without admittance: *Cooper* v. *Norfolk Rail. Co.*, 3 Ex. 546.

(*c*) A lord entitled by custom to fines on surrender and admittance is not entitled to a fine on the execution of a conveyance by a copyholder to a railway company under this section, nor on the enrolment of the conveyance, nor to any compensation under sect. 96, *post*, for loss of the fines: *Ecclesiastical Commissioners* v. *London and South Western Rail. Co.*, 14 C. B. 743.

(*d*) The tenant for life of a manor is not entitled as against the

Enfranchisement under Lands Clauses Act.

agreed upon or determined, or on deposit thereof in the bank in any of the cases hereinbefore in that behalf provided, the lord of the manor whereof such copyhold or customary lands shall be holden shall enfranchise such lands, and the lands so enfranchised shall for ever thereafter be held in free and common socage; and in default of such enfranchisement by the lord of the manor, or if he fail to adduce a good title thereto to the satisfaction of the promoters of the undertaking, it shall be lawful for them if they think fit to execute a deed-poll duly stamped in the manner hereinbefore provided in the case of the purchase of lands by them, and thereupon the lands in respect of the enfranchisement whereof such compensation shall have been deposited as aforesaid shall be deemed to be enfranchised, and shall be for ever thereafter held in free and common socage."

franchise on payment of compensation.

Enfranchisement by deed-poll in certain cases.

Apportionment of copyhold rents.

Sect. 98. "If any such copyhold or customary lands be subject to any customary or other rent, and part only of the land subject to any such rent be required to be taken for the purposes of the special Act, the apportionment of such rent may be settled by agreement between the owner of the lands and the lord of the manor on the one part, and the promoters of the undertaking on the other part, and if such apportionment be not so settled by agreement, then the same shall be settled by two justices; and the enfranchisement of any copyhold or customary lands taken by virtue of the special Act, or the apportionment of such rents, shall not affect in other respects any custom by or under which any such copyhold or customary lands not taken for such purposes shall be held; and if any of the lands so required be released from any portion of the rents to which they were subject jointly with any other lands, such last-mentioned lands shall be charged with the remainder only of such rents; and with reference to any such apportioned rents, the lord of the manor shall have all the same rights and remedies over the lands to which such apportioned rents shall have been assigned or attributed as he had previously over the whole of the lands subject to such rents for the whole of such rents."

These provisions, requiring the immediate enfranchisement of copyholds compulsorily taken by public companies, are evidently intended to meet the difficulties which would arise if the lord were to refuse

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remainderman to any part of the moneys paid into Court by a company upon a compulsory taking of the copyhold lands, as representing fines; the compensation for lost fines is included in the consideration, and the tenant for life is entitled only to the income arising from the investment of the consideration: *Re Wilson's Estate*, 11 W. R. 295; 7 L. T., N. S. 772.

to receive a surrender to the use of the company. See *Att.-Gen.* v. *Lewin*, 8 Sim. 366.

Enfranchisement under Settled Land Acts.

Enfranchisement under the Settled Land Act, 1882.] —The Settled Land Act, 1882 (45 & 46 Vict. c. 38), contains provisions for enabling tenants for life, and other limited owners of settled lands, to effect enfranchisements. By sect. 3, sub-sect. (ii), it is enacted that:—

Enfranchisements by limited owners under the Settled Land Act, 1882.

"A tenant for life, where the settlement comprises a manor, may sell (*e*) the seignory of any freehold land within the manor, or the freehold and inheritance of any copyhold or customary land, parcel of the manor, with or without any exception or reservation of all or any mines or minerals, or of any rights or powers relative to mining purposes, so as in every such case to effect an enfranchisement."

Powers to tenant for life to enfranchise.

Sect. 4 (1). "Every sale shall be made at the best price that can reasonably be obtained."

Sect. 4 (7). "An enfranchisement may be made with or without a re-grant of any right of common or other right, easement, or privilege theretofore appendant or appurtenant to or held or enjoyed with the land enfranchised, or reputed so to be."

Regulations respecting enfranchisement.

Sect. 5. "Where on a sale, exchange, or partition, there is an incumbrance affecting land sold or given in exchange or on partition, the tenant for life, with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold or so given, and by conveyance of the fee simple or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, make provision accordingly."

Transfer of incumbrances.

Sect. 18. "Where money is required for enfranchisement, or for equality of exchange or partition, the tenant for life may raise the same on mortgage of the settled land, or of any part thereof, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, and the money raised shall be capital money arising under this Act."

Mortgage to raise money for enfranchisement.

Sect. 20 (1). "On a sale, exchange, partition, lease, mortgage, or charge, the tenant for life may, as regards land sold, given in

(*e*) Enfranchisement is here treated as a sale, and there seems to be no doubt that most of the provisions throughout the Act regarding sales will apply equally to enfranchisements by limited owners.

Enfranchisement under Settled Land Acts.

exchange, or on partition, leased, mortgaged, or charged, or intended so to be, including copyhold, or customary, or leasehold land vested in trustees, or as regards easements or other rights or privileges sold or leased, or intended so to be, convey or create the same by deed for the estate or interest the subject of the settlement, or for any less estate or interest, to the uses and in the manner requisite for giving effect to the sale, exchange, partition, lease, mortgage, or charge."

Money received on an enfranchisement, being capital money arising under the Act, must be applied or invested as directed by sect. 21 of that Act, and "the purchase of a seignory of any part of the settled land, being freehold land, or of the fee simple of any part of the settled land, being copyhold or customary land," is one of the modes of applying capital moneys authorized by that section. For the purpose of application or investment, enfranchisement moneys must be paid, at the option of the tenant for life, either into Court or to the trustees of the settlement (sect. 22), whose receipt is a sufficient discharge to the person paying the money (sect. 40).

An agreement for enfranchisement, entered into by a tenant for life of a settled manor, is binding upon the persons entitled in remainder (sect. 31).

A tenant for life intending to exercise his power of enfranchisement under this Act, should give notice at least one month previously to the trustees of the settlement, and to their solicitor (sect. 45).

A tenant for life cannot alienate or otherwise deprive himself of his powers of enfranchisement, but must not exercise such powers to the prejudice of an assignee for value of the interest of the tenant for life (sects. 50, 51).

This Act contains the following further provisions relating to enfranchisements:—

General protection of purchasers, &c.

Sect. 54. "On a sale, exchange, partition, lease, mortgage, or charge, a purchaser, lessee, mortgagee, or other person dealing in good faith with a tenant for life shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or rent, as the case may require, that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions of this Act."

Exercise of

Sect. 55 (1). "Powers and authorities conferred by this Act

on a tenant for life or trustees or the Court or the Land Commissioners are exerciseable from time to time.

Enfranchisement under Settled Land Acts.

(2). "Where a power of sale, enfranchisement, exchange, partition, leasing, mortgaging, or charging, or other power is exercised by a tenant for life or by the trustees of a settlement, he and they may respectively execute, make, and do all deeds, instruments, and things necessary or proper in that behalf.

powers, limitation of provisions, &c.

(3). "Where any provision in this Act refers to sale, purchase, exchange, partition, leasing, or other dealing, or to any power, consent, payment, receipt, deed, assurance, contract, expenses, act, or transaction, the same shall be construed to extend only (unless it is otherwise expressed) to sales, purchases, exchanges, partitions, leasings, dealings, powers, consents, payments, receipts, deeds, assurances, contracts, expenses, acts, and transactions under this Act."

Sect. 56 (1). "Nothing in this Act shall take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exerciseable by a tenant for life, or by trustees with his consent, or on his request, or by his direction, or otherwise; and the powers given by this Act are accumulative.

(2). "But, in case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail; and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life (*f*) shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exerciseable for any purpose provided for in this Act."

Persons under disability.

If a tenant for life is an infant, the power may be exercised on his or her behalf by the trustees of the settlement, or under the order of the Court (sect. 60).

Married women may exercise the power either solely or jointly with their husbands, according as they are entitled to their separate use or by statute for their separate property, or not so entitled (sect. 61).

When a tenant for life is a lunatic, his committee may, in his name and on his behalf, under an order in lunacy, exercise the statutory power of enfranchisement (sect. 62).

(*f*) Where there are several concurrent tenants for life, the consent of one of those persons is sufficient: see sect. 6 (2) of the Settled Land Act, 1884 (47 & 48 Vict. c. 18).

PRECEDENTS.

I. *DEED OF ENFRANCHISEMENT to a Copyhold Tenant by a Lord of a Manor seised in Fee.* RE-GRANT *of* COMMONABLE RIGHTS.

THIS INDENTURE, made the ——— day of ———,

Parties. BETWEEN [*lord*], of &c., lord of the manor of ———, in the county of ———, of the one part; and [*copyholder*], of &c., a copyholder of the same manor, of the other part: WITNESSETH, that, in consideration of the sum of £———, to the said [*lord*] now paid by the said [*copyholder*] (the receipt whereof the said [*lord*] hereby acknowledges), the said [*lord*], as beneficial owner, hereby enfranchises, releases, and conveys unto the said [*copyholder*], his heirs and assigns, ALL THAT (*describe parcels*): TO HOLD the same premises UNTO AND TO THE USE of the said [*tenant*], his heirs and assigns, as freehold, henceforth and for ever discharged from all fines and quit rents, and other incidents whatsoever of copyhold or customary tenure.

Re-grant of rights of common. AND THIS INDENTURE ALSO WITNESSETH, that, for the consideration aforesaid, the said [*lord*], as beneficial owner, hereby grants, conveys, and confirms unto the said [*copyholder*], his heirs and assigns, all such commonage and right to common, of what nature soever, in, over, or upon all or any of the wastes, commons, and commonable lands belonging to the said manor as he the said [*copyholder*] held and enjoyed in respect of the hereditaments and premises hereinbefore described, and hereby granted and enfranchised, or any of them, immediately before the execution of these presents, and the freehold and inheritance thereof, in as large and beneficial a manner as the said [*copyholder*] has heretofore used and exercised all or any such rights, or as he or his heirs or assigns could or might have used and exercised the

same, in respect of the said hereditaments and premises, or any of them, if the same had continued to be parcel of the said manor: To HOLD the said premises lastly hereby conveyed UNTO AND TO THE USE OF the said [*copyholder*], his heirs and assigns, for ever (*a*). IN WITNESS, &c.

I. Enfranchisement by Lord absolutely Entitled.

II. *DEED OF ENFRANCHISEMENT by* TRUSTEES *under a Power in a Settlement, with the consent of the* TENANT FOR LIFE.

THIS INDENTURE, made the ——— day of ———, 18—, BETWEEN [*trustee*], of ———, in the county of ———, Esquire, and [*trustee*], of &c., of the first part; [*tenant for life*], of &c., of the second part; and [*copyholder*], of &c., of the third part: WHEREAS by an indenture of settlement dated the ——— day of ———, 18—, and made between [*parties*], the copyhold hereditaments, parcel of the manor of ———, in the county of ———, hereinafter described and hereby enfranchised, were (with other hereditaments) conveyed and settled to the uses and upon the trusts therein expressed of the same; and in the indenture now in recital was contained a power for the trustees for the time being thereof [*recite the power of enfranchisement with consent of the tenant for life ver-*

Parties.

Recitals: of settlement creating the power;

(*a*) It is usual that the deed of enfranchisement should be enrolled on the court rolls of the manor, though this is not otherwise important than for the purpose of preserving evidence of the transaction; and, for this purpose, a short memorandum will be sufficient.

It has hitherto been the practice where the enfranchised land formed part of a larger estate that the lord should enter into a covenant for the production of title deeds and court rolls. But by the Conveyancing Act, 1881, s. 3, sub-s. 2, the purchaser of the freehold, after enfranchisement, has no right to call for the title to make the enfranchisement, so that the insertion in the enfranchisement deed of such a covenant, or of a statutory acknowledgment and undertaking for production and safe custody of the deeds, would seem not to be necessary for the protection of the copyholder whose lands are enfranchised, nor of any practical value to him for any purpose; and in the case of *Re Agg Gardner*, 25 Ch. D. 600, *Bacon*, V.-C., expressed his opinion that the lord cannot be required to give any acknowledgment at all. For a form of acknowledgment, &c., see *post*, p. 911.

II. By Trustees under a Power.

batim]: And whereas the said [*original trustee*] died on the ——— day of ———, 18—, and by an indenture dated, &c., and made between [*parties*], and expressed to be supplemental to the said indenture of settlement, the said [*trustee*] was appointed to be a trustee of the said indenture of settlement in the place of the said [*original trustee*] deceased: And whereas at a court holden for the said manor on the ——— day of ———, 18—, the said [*copyholder*] was admitted tenant to the said copyhold hereditaments: And whereas the said [*trustees*], with the consent of the said [*tenant for life*], have agreed with the said [*copyholder*] for the enfranchisement of the said copyhold hereditaments at the price of £———.

of death of a trustee and appointment of a new trustee;

of admittance of copyholder;

of agreement for enfranchisement.

Testatum. Now this Indenture Witnesseth, that in pursuance of the said agreement, and in consideration of the sum of £——— now paid by the said [*copyholder*] to the said [*trustees*], with the consent of the said [*tenant for life*] (the receipt of which sum of £——— the said [*trustees*] hereby acknowledge), the said [*trustees*], in exercise of the hereinbefore recited power given to them by the said indenture of settlement, and of every other power enabling them in this behalf, and with the consent (hereby testified) of the said [*tenant for life*], hereby absolutely revoke all the uses, trusts, powers, and provisoes which under or by virtue of the hereinbefore recited indenture of settlement are now subsisting or capable of taking effect in the freehold and inheritance of the said copyhold hereditaments, and of the commonage and right of common in, over, or upon all or any of the wastes, commons, and commonable lands belonging to the said manor, and hereby, as trustees, appoint and enfranchise, and by way of further assurance release and convey, All [*describe parcels*], To hold the same premises Unto and to the use of the said [*copyholder*], his heirs and assigns, as freehold, &c. [*ut ante*, p. 898].

Revocation of uses, &c. of settlement.

Enfranchisement.

Further *testatum.* Re-grant of rights of common.

And this Indenture also Witnesseth, that for the consideration aforesaid the said [*trustees*], with the consent (hereby testified) of the said [*tenant for life*], in exercise of the aforesaid power, and of every other power enabling them in this behalf as trustees, appoint, and by way of further assurance grant, convey, and confirm unto the said [*copyholder*], his heirs and assigns [*continue ut ante*, p. 898], To hold the said premises lastly hereby appointed and conveyed, Unto and to the use of the said [*copyholder*], his heirs and assigns, for ever. In witness, &c.

III. *DEED OF ENFRANCHISEMENT with the* CONCURRENCE *of the* LAND COMMISSIONERS *for England, in* CONSIDERATION *of a* GROSS SUM (*b*).

THIS INDENTURE, made the ——— day of ———, 18—, BETWEEN [*lord*], lord of the manor of ———, of the first part; the Land Commissioners for England, of the second part; and [*tenant*], of ———, in the county of ———, a tenant of the said manor, of the third part: WHEREAS on or about the ——— day of ———, 18—, the said [*copyholder*] was admitted tenant to the copyhold hereditaments parcel of the said manor described in the schedule hereto, upon an absolute surrender passed to his use by [*surrenderor*] [*or* by virtue of a bargain and sale from the executors of ———, *or* by virtue of the will of [*testator*], *or* as customary heir of [*intestate*] *as the case may be*]: AND WHEREAS the said [*lord*] has under the authority of the Copyhold Acts, agreed with the said [*tenant*] for the enfranchisement of the said hereditaments, at the sum of £———. NOW THIS INDENTURE WITNESSETH, that in consideration of the said sum of £——— by the said [*tenant*] to the said [*lord*] now paid (the receipt of which the said [*lord*] hereby acknowledges), he the said [*lord*] with the consent of the Land Commissioners for England, and in exercise of any power given to him by the said Copyhold Acts, or any other power whatsoever, hereby enfranchises and releases (*c*) unto the said [*tenant*], his heirs and assigns, ALL and singular the hereditaments to which the said [*tenant*] was so admitted tenant as hereinbefore recited, and which are described in the schedule hereto, TOGETHER with their appurtenances, and all mines, minerals, rights and easements thereto belonging [*or* SAVE AND EXCEPT all rights reserved by the Copyhold Act, 1852, s. 48]: To HOLD the said hereditaments and premises hereby

Parties.

Recitals: of tenant's admittance;

of contract for enfranchisement.

Testatum.

Enfranchisement.

(*b*) This precedent is according to a form issued by the Land Commissioners as a model to be followed as near as may be under the circumstances of the particular case. The deed of enfranchisement will, however, be prepared by the solicitors or counsel of the parties, and a draft thereof must be submitted to the commissioners for their approval.

(*c*) No covenants for title by the lord, implied by his conveying "as beneficial owner," or otherwise, are required.

III. Under Copyhold Acts, for Gross Sum.

enfranchised UNTO AND TO THE USE of the said [*tenant*], his heirs and assigns, as freehold, henceforth and for ever discharged by these presents from all fines and quit-rents, and all other incidents whatsoever of copyhold or customary tenure (*d*). IN WITNESS whereof, the said parties of the first and third parts have set their hands and seals, and the said Land Commissioners have set their hands and their official seal.

THE SCHEDULE ABOVE REFERRED TO.

IV. *DEED OF ENFRANCHISEMENT by a* TENANT FOR LIFE *of a Settled Manor with the Concurrence of the* LAND COMMISSIONERS, *in* CONSIDERATION *of a Yearly* RENT-CHARGE.

Parties.

THIS INDENTURE, made the ——— day of ———, 18—, BETWEEN [*lord*], of &c., of the first part; the Land Commissioners for England, of the second part; and [*copyholder*], of &c., a tenant of the said manor, of the third part: WHEREAS under or by virtue of an indenture of settlement, dated &c., and made between [*parties*], the said [*lord*] is tenant for life of the lands and hereditaments thereby settled, and lord of the manor of ———, in the county of ———, being part of the same hereditaments:

Recitals: admittance of tenant;

AND WHEREAS, on or about the ——— day of ———, 18—, the said [*copyholder*] was admitted tenant to the copyhold hereditaments, parcel of the said manor, described in the schedule hereunder written as the customary heir of [*intestate*], of &c., deceased: AND WHEREAS the said [*lord*]

contract for enfranchisement.

has, under the authority of the Copyhold Acts, agreed with the said [*copyholder*] for the enfranchisement of the said hereditaments, in consideration of a grant of a clear rent-charge, or annual rent in fee, as hereinafter mentioned, to be henceforth charged on and issuing out of the said hereditaments, such rent-charge to be fixed at the amount of £——— per annum

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(*d*) The commonable rights of the copyholder being preserved on an enfranchisement under the Copyhold Acts, there is no necessity to insert here a regrant of such rights.

in money. NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement and in consideration of the said annual rent in fee hereinafter granted to be paid by the said [*copyholder*] to the said [*lord*], as is hereinafter provided, he the said [*lord*], with the consent of the Land Commissioners for England, and in exercise of the power given to him by the said Copyhold Acts, or any other power whatsoever, hereby enfranchises and releases (*e*) unto the said [*copyholder*], his heirs and assigns, ALL and singular the hereditaments to which the said tenant was so admitted tenant as hereinbefore recited, and which are described in the schedule hereunder written: TOGETHER with the appurtenances and all mines, minerals, rights and easements thereto belonging [*or* SAVE AND EXCEPT, *ut ante*, p. 901]: TO HOLD the said hereditaments hereby enfranchised unto the said [*copyholder*], his heirs and assigns, as freehold, henceforth and for ever discharged by these presents from all fines, quit rents, and all other incidents whatsoever of copyhold or customary tenure: TO THE USE that a clear annual rent in fee, rent-charge, or of £———, shall be henceforth and for ever charged upon and issuing out of the hereditaments hereby enfranchised, and shall be for ever hereafter received by the said [*lord*], his heirs and assigns, or other the person or persons who under the uses and trusts limited by the said will is or shall be entitled to the rents and profits of the said manor, free from all deductions, by equal half-yearly payments, on the ——— day of ——— and the ——— day of ——— in every year, the first of such payments to be made on the ——— day of ——— next, and charged with and subject to the said annual rent and the uses aforesaid: TO THE USE of the said [*copyholder*], his heirs and assigns, for ever. AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance of the said agreement, and for more perfectly securing the payment of the annual rent aforesaid, and in consideration of the enfranchisement hereinbefore contained to the

IV. Under Copyhold Acts, by Tenant for Life, for Rent-charge.

Testatum.

Enfranchisement.

Further *testatum.*

Grant by copyholder to lord of a rent-charge (*f*).

(*e*) See *ante*, p. 901, note (*c*).

(*f*) It must be borne in mind that the Copyhold Act, 1843, requires the enfranchisement to be in consideration of a *grant* of an annual rent. See *ante*, p. 877. As to the effect of sect. 44 of the Conveyancing and Law of Property Act, 1881, in doing

IV. Under Copyhold Acts, by Tenant for Life, for Rent-charge.

said [*copyholder*], with the consent of the Land Commissioners, and in exercise of the power aforesaid, hereby, as beneficial owner, grants and conveys unto the said [*lord*], his heirs and assigns, a clear yearly rent in fee of £———, to be paid at the times and in manner hereinbefore mentioned: To HOLD, receive and take the same unto the said [*lord*], his heirs and assigns, to the uses and upon the trusts to and upon which the said manor is now held and settled under the limitations of the said will: AND the said [*copyholder*] hereby charges the hereditaments hereby enfranchised with the payment henceforth and for ever of the said annual rent in fee hereby granted, and covenants with the said [*lord*] to pay to the said [*lord*], his heirs or assigns, or other the person or persons entitled as aforesaid, the same annual rent as and when the same shall become payable. IN WITNESS, &c.

Charge, and covenant to pay annual rent.

THE SCHEDULE ABOVE REFERRED TO.

V. *DEED OF ENFRANCHISEMENT by a* DEAN AND CHAPTER, *with the* CONCURRENCE *of the* LAND COMMISSIONERS (*g*).

Parties.

THIS INDENTURE, made between the Very Reverend [*dean*], Dean of the Cathedral Church of ———, and the Chapter of the same Church, lords of the manor of ———, in the county of ———, of the first part; the Land Commissioners for England of the second part; and [*copyholder*], of &c., of the third part. [*Recite tenant's admittance and contract for enfranchisement, ut ante*, p. 901]. AND WHEREAS it appears to the said Land Commissioners that the enfranchisement hereby intended to be effected might have been effected under the provisions of the Act of the fourteenth

Recitals: of approval of the proposed enfranchisement by Land Commissioners.

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away with the necessity of inserting in a deed creating a rent-charge powers of distress and entry, and a limitation of a term of years to secure the rent-charge, see *ante*, tit. ANNUITIES, Vol. I. pp. 671 *et seq.*

(*g*) The above precedent is taken from a form which has been approved by the Land Commissioners and Church Estates Commissioners. Notice of the proposed enfranchisement should be sent to the Ecclesiastical Commissioners.

V. Under Copyhold Acts, by Ecclesiastical Corporation.

and fifteenth of her Majesty, chapter one hundred and four, intituled "An Act to facilitate the Management and Improvement of Episcopal and Capitular Estates in England." NOW THIS INDENTURE WITNESSETH, that in consideration of the sum of £——— by the said [*copyholder*], paid into the Bank of England, pursuant to the provisions of the Copyhold Act, 1858, to the account of the Church Estates Commissioners (being the account by them appointed in that behalf), the sum of £———, being the moneys payable on the said enfranchisement for the benefit of the said Dean and Chapter, as appears by a memorandum of the receipt of the said sum endorsed on these presents and signed by the said Church Estate Commissioners, the said dean and chapter, by the authority and with the consent of the said Land Commissioners (hereby testified), and in exercise of the power given to them by the Copyhold Acts, and of every other power enabling them in this behalf, hereby enfranchise and release (*h*) unto the said [*copyholder*], his heirs and assigns, ALL and singular the hereditaments to which the said [*copyholder*] was so admitted tenant as is hereinbefore recited, and which are described in the schedule hereunder written, TOGETHER with all appurtenances, and all mines, minerals, rights and easements thereunto belonging [*or* SAVE AND EXCEPT, *ut ante*, p. 901]: TO HOLD the hereditaments hereby enfranchised UNTO AND TO THE USE of the said [*copyholder*], his heirs and assigns, as freehold, henceforth and for ever discharged by these presents from all fines, quit rents, and all other incidents whatever of copyhold or customary tenure. IN WITNESS, &c.

Testatum.

Enfranchisement.

THE SCHEDULE ABOVE REFERRED TO.

VI. *DEED OF ENFRANCHISEMENT to a* RAILWAY COMPANY.

THIS INDENTURE, made the ——— day of ———, 18—, BETWEEN [*lord*], of &c., lord of the manor of ———, in the county of ———, of the one part, and the ——— Railway Company, constituted by the ——— Railway Act,

Parties.

(*h*) See *ante*, p. 901, note (*c*).

VI. Under Lands Clauses Consolidation Act, 1845.

18— (hereinafter referred to as "the Special Act"), in which Act the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, are respectively incorporated, and hereinafter referred to as "the Company," of the other part.

Recitals: of the lord's seisin of the manor.

WHEREAS the pieces of land and hereditaments hereinafter described and intended to be hereby conveyed, being parcel of the copyhold or customary lands of the said manor, by the Special Act and the Public Acts incorporated therewith, are authorized to be taken and are required by the Company for the purposes of their railway and undertaking, and the same have, by an indenture dated the ——— day of ———, 18—, and entered on the court rolls of the said manor, and made between [*tenant*], of &c., the copyhold or customary tenant thereof, of the one part, and the Company of the other part, been duly conveyed to the Company, their successors and assigns for ever, but subject, nevertheless, until the same should have been enfranchised by virtue of the provisions contained in the Special Act, or the Public Acts incorporated therewith, to the fines, rents, heriots, and services theretofore payable and of right accustomed in respect thereof:

Requisition of the land for railway purposes, and consequent conveyance by the copyholder to the company.

Agreement for enfranchisement.

AND WHEREAS in pursuance to the direction of the said Lands Clauses Consolidation Act, 1845, in this behalf, the Company on or about the ——— day of ———, 18—, applied to the said [*lord*] to enfranchise the said hereditaments and premises, and to convey the same and the timber and underwood thereupon, and the mines and minerals thereunder, to the Company, whereupon the said [*lord*] agreed to accept and take the sum of £——— as compensation for such enfranchisement and conveyance, and for the loss to be sustained by him in respect of the fines, heriots, and other services payable on death, descent or alienation, or any other matters lost by the vesting of the said pieces of land and premises in the Company, or by the enfranchisement thereof:

Testatum.

Conveyance by the lord.

NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in exercise of the powers in this behalf given to him by the said Lands Clauses Consolidation Act, 1845, and of every other power (if any) him hereunto enabling, and in consideration of the sum of £——— by the Company now paid to the said [*lord*] (the receipt whereof the said [*lord*] hereby acknowledges), the said [*lord*] hereby, as beneficial owner, enfranchises,

releases, and conveys to the Company and their successors, ALL those pieces of land and hereditaments situate in the parish of ———, in the county of ———, which were late in the occupation of ———, as tenant thereof, but are now in the actual possession of the Company, all which pieces of land and hereditaments are delineated in the plan drawn in the margin of these presents, and therein coloured red, and are in the same plan, and also in the plans and books of reference of the said railway for the parish of ———, distinguished by the numbers —, —, and — respectively: TOGETHER with all mines and minerals thereunder (*i*), and all timber and other trees thereon, and all appurtenances to the same premises belonging or reputed to be held therewith: TO HOLD the premises unto and to the use of the Company, their successors and assigns, for ever, as freehold, henceforth and for ever hereafter discharged and enfranchised from all fines, heriots, and other services and customs whatsoever, to or with which, according to the custom of the said manor of ———, the same hereditaments and premises now are or heretofore have been subject or liable to be charged, and all other incidents whatsoever of copyhold or customary tenure: AND IT IS HEREBY DECLARED by the parties hereunto that these presents are intended to operate and take effect as a conveyance of the pieces of land and hereditaments intended to be hereby assured, made as near to the form of Schedule A. to the Lands Clauses Consolidation Act, 1845, as the circumstances of the case will admit, and also in every other mode in which the same may operate and take effect, independently of such last-mentioned Act. IN WITNESS, &c.

VI. Under Lands Clauses Consolidation Act, 1845.

Parcels, including mines, &c.

Declaration that deed is to operate under the Lands Clauses Consolidation Act.

VII. *DEED POLL by a* RAILWAY COMPANY *for Vesting the Freehold Inheritance of Copyholds in lieu of Enfranchisement; the* LORD OF THE MANOR *not being able to adduce a Good Title.*

TO ALL TO WHOM THESE PRESENTS SHALL COME, The ——— Railway Company, incorporated by the ———

Commencement.

(*i*) The company is not entitled to mines unless expressly purchased and named in the conveyance. See sect. 77 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20).

VII. By Deed Poll under Lands Clauses Consolidation Act.

Railway Act, 18— (hereinafter called the "Special Act"), in which Act the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, are respectively incorporated, and hereinafter referred to as the company, send greeting: WHEREAS the pieces of land and hereditaments described in the schedule hereunder written, and more particularly delineated in the plan hereupon indorsed and therein coloured red, are held by copy of court roll of the manor of ———, in the county of ———, and the same by the Special Act, &c. [*here recite requisition of the land for railway purposes and consequent conveyance by the copyholder to the company, as at* p. 906]: AND WHEREAS [*the lord*], of &c., claims to be seised in fee simple in possession of the said manor of ———: AND WHEREAS the company, in pursuance of the direction of the said Lands Clauses Consolidation Act, 1845, in this behalf, on or about the ——— day of ——— last, applied to him to enfranchise, &c. [*here recite the agreement for enfranchisement as at* p. 906, *ante, to the end of the recital, and then proceed as follows:*]; but on the investigation of the title of ———, the said [*lord*] failed to adduce a good title to the said manor to the satisfaction of the said company, and accordingly the said company, in obedience to the directions of the said Lands Clauses Consolidation Act, 1845, on the ——— day of ——— last, paid the sum of £——— (being such consideration money as aforesaid), and the sum of £——— (being such compensation money as aforesaid), into the Bank of England in the name and with the privity of the Paymaster General of the High Court of Justice, Chancery Division, to his account there, *Ex parte* the ——— Railway Company, *in the matter of the* ——— Railway Act, 18—, as appears by the receipt in writing, dated the ——— day of ———, of the cashier of the said bank. NOW THESE PRESENTS WITNESS, that in exercise of the power in this behalf to the company given by the said Lands Clauses Consolidation Act, 1845, the company hereby declare that the said [*lord*] has failed to adduce a good title to the said manor of ——— to their satisfaction, and hereby further declare that the said pieces of land and hereditaments, and all other the lands in respect whereof the above-mentioned sum of £——— has been deposited and paid into the Bank of England as aforesaid, shall be and are hereby absolutely vested in the company,

Recitals: that lands are parcel of the copyhold of the manor, have been required by the company, and conveyed to them by the copyholder.

Application to lord to enfranchise, and his failure to deduce a good title.

Payment of the purchase-money and compensation into the Bank of England.

their successors and assigns, so that the copyhold or customary tenure of the same hereditaments and premises may become and be henceforth extinguished, and the same may be for ever hereafter held by the company, their successors and assigns, in fee and common socage absolutely enfranchised from all fines, heriots, and other services and incidents whatsoever of copyhold or customary tenure. IN WITNESS, &c. VII. By Deed Poll under Lands Clauses Consolidation Act.

THE SCHEDULE ABOVE REFERRED TO.

VIII. *DEED OF ENFRANCHISEMENT by a* TENANT FOR LIFE, LORD *of a* SETTLED MANOR; *the* TRUSTEES *of the* SETTLEMENT *joining in order to give* RECEIPTS *for the* CONSIDERATION; RESERVATION *of* MINES, MINERALS, *&c.*; RE-GRANT *of* COMMONABLE RIGHTS.

THIS INDENTURE, made the ——— day of ———, 18—, BETWEEN [*tenant for life*], of &c., of the first part; [*trustee*], of &c., and [*trustee*], of &c., of the second part; and [*copyholder*], of &c., of the third part: WHEREAS under or by virtue of an indenture of settlement dated &c., and expressed to be made between [*parties*], and other assurances, the said [*tenant for life*] is now entitled as tenant for life in possession to (amongst other hereditaments thereby settled) the manor of ———, in the county of ———, and the freehold inheritance of the copyhold and customary lands parcel of the said manor; And the said [*trustees*] are the present trustees of the settlement within the meaning of the Settled Land Act, 1882: AND WHEREAS at a court holden for the said manor on the ——— day of ———, 18—, the said [*copyholder*] was admitted to the copyhold lands and hereditaments described in the schedule hereunder written: AND WHEREAS the said [*tenant for life*] has agreed with [*copyholder*] for the enfranchisement of the said copyhold and customary lands for the sum of £——— to be paid to [*trustee*], and [*trustee*], as such trustees as aforesaid. NOW THIS INDENTURE WITNESSETH, that for the purpose of effecting such enfranchisement, and in consideration of £ ——— Parties. Recitals: of settlement; of admittance of copyholder; of agreement to enfranchise; *Testatum.* Enfranchisement.

VIII. By Tenant for Life under Settled Land Act, 1882.

upon the execution of these presents by the said [*copyholder*], at the request and by the direction of the said [*tenant for life*], paid to the said [*trustees*] (the receipt whereof they hereby acknowledge), he the said [*tenant for life*] in exercise of the power in that behalf given to him by the said Settled Land Act, and of any other power him hereunto enabling, as beneficial owner, hereby enfranchises, releases, and conveys unto the said [*copyholder*], All those copyhold lands and hereditaments of the manor of ——— aforesaid, to which the said [*copyholder*] was admitted as aforesaid, and which are more particularly described in the said schedule hereunder written, EXCEPTING and always reserved unto the said [*tenant for life*], and his assigns, during his life, and after his death for the persons for the time being entitled under or by virtue of the said settlement to the possession, or to the rents and profits of the lands thereby settled, all mines, minerals, and quarries, whether opened or in work or not, in, on, or under the lands and premises hereinbefore expressed to be hereby enfranchised, or any part thereof, Together with full and free liberty, and power to and for the said [*tenant for life*], and such other persons as aforesaid, and his and their agents, workmen, and others, by his and their authority, with or without horses, carts, and other carriages, and all necessary implements and materials, at all times to enter into and upon the premises hereby enfranchised, or any part thereof, and to sink any pit or shaft therein, and to make, erect, and construct therein, or thereon, any rail or other ways, roads, buildings, and engineering or other works for the purpose of sinking, searching for, winning, working, getting, making merchantable, smelting or otherwise converting, or working, carrying away, and disposing of, any mines and minerals in or under the premises hereby enfranchised, or any part thereof, or any adjoining or neighbouring mines or quarries, without paying any compensation for any unavoidable damage to be done or occasioned thereby, except that the said [*tenant for life*], and such persons as aforesaid, shall make compensation to the said [*copyholder*], and his heirs and assigns, for all damages to be done or occasioned in or by the making of any pit or shaft, or way, and the construction of any such buildings or works as aforesaid, in or after the rate of ——— for every superficial square yard of land for a year, and so in proportion for any greater or less quantity than a

Reservation of mines,

and of right of entry to work minerals, &c.,

VIII. By Tenant for Life under Settled Land Act, 1882.

yard, or for any longer or shorter time than a year: And also excepting and reserved unto the said [*tenant for life*], and such persons as aforesaid, full and free liberty and power at all reasonable times, with or without agents, surveyors or workmen, to enter into and upon the premises hereinbefore expressed to be hereby enfranchised, or any part thereof, in order to inspect the state and condition of any mines or minerals therein or thereon respectively, To HOLD the said premises hereby enfranchised (excepting and reserved as aforesaid), unto and to the use of the said [*copyholder*], his heirs and assigns, as freehold, henceforth and for ever discharged from fines, heriots, quit-rents, and all other incidents whatsoever of copyhold or customary tenure: AND THIS INDENTURE ALSO WITNESSETH that, for the consideration aforesaid, the said [*tenant for life*] as beneficial owner, hereby grants and conveys unto the said [*copyholder*], ALL rights of common and other rights, easements, and privileges (excepting and reserved as aforesaid), heretofore appendant or appurtenant to, or held, or enjoyed with the lands and premises hereby enfranchised, or reputed so to be, To HOLD THE SAME UNTO AND TO THE USE of the said [*copyholder*], his heirs and assigns for ever. PROVIDED ALWAYS, that the covenants by the said [*tenant for life*] implied by the conveyances herein respectively contained, shall not as respects the reversion or remainder expectant on his life estate, and the title to and further assurance of the premises after his death, extend to the acts or defaults of any person or persons other than or besides himself and his own heirs and persons claiming or to claim under or in trust for him, them, or some of them. AND the said tenant for life hereby acknowledges the right of the said [*copyholder*] to production of the hereinbefore recited indenture of settlement, and the court rolls of the said manor so far as the same relate to the premises hereby enfranchised, and to delivery of copies thereof, and he hereby undertakes for safe custody thereof. IN WITNESS, &c.

and to inspect state of mines.

Further *testatum*.

Re-grant of common rights.

Proviso restricting tenant for life's covenants.

Acknowledgment and undertaking as to muniments of title (*k*).

THE SCHEDULE ABOVE REFERRED TO.

(*k*) The lord cannot apparently be required to give this acknowledgment and undertaking, in the absence of express agreement between the parties to the contrary. See *ante*, p. 899, note (*a*).

ENLARGEMENT OF LONG TERMS.

PRELIMINARY REMARKS.

Stat. 44 & 45 Vict. c. 41.

The Conveyancing and Law of Property Act, 1881, enacts as follows :—

Enlargement of residue of long terms into fee simple.

Sect. 65 (1). "Where a residue unexpired of not less than two hundred years of a term, which, as originally created, was for not less than three hundred years, is subsisting in land, whether being the whole land originally comprised in the term, or part only thereof, without any trust or right of redemption affecting the term in favour of the freeholder, or other person entitled in reversion expectant on the term, and without any rent, or with merely a peppercorn rent or other rent having no money value, incident to the reversion, or having had a rent, not being merely a peppercorn rent or other rent having no money value, originally so incident, which subsequently has been released, or has become barred by lapse of time (*a*), or has in any other way ceased to be payable, then the term may be enlarged into a fee simple in the manner, and subject to the restrictions, in this section provided.

"(2.) Each of the following persons (namely) :

"(i.) Any person beneficially entitled in right of the term, whether subject to any incumbrance or not, to possession of any land comprised in the term; but, in case of a married woman, with the concurrence of her husband, unless she is entitled for her separate use, whether with restraint on anticipation or not, and then without his concurrence ;

"(ii.) Any person being in receipt of income as trustee in right of the term, or having the term vested in him in trust for sale, whether subject to any incumbrance or not ;

"(iii.) Any person in whom, as personal representative of any deceased person, the term is vested, whether subject to any incumbrance or not ;

shall, as far as regards the land to which he is entitled, or in

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(*a*) As it is well established that the rent payable under a lease is not within the Statute of Limitations, it is not easy to see what is the meaning or effect of the words "barred by lapse of time." As to the principle of law referred to, see *Grant* v. *Ellis*, 9 M. & W. 113 ; *Archbold* v. *Scully*, 9 H. L. C. 360. See also Sugd. R. P. Stat. 63, 2nd ed.

which he is interested, in right of the term, in any such character as aforesaid, have power by deed to declare to the effect that, from and after the execution of the deed, the term shall be enlarged into a fee simple. Enlargement of Long Terms.

"(3.) Thereupon, by virtue of the deed and of this Act, the term shall become and be enlarged accordingly, and the person in whom the term was previously vested shall acquire and have in the land a fee simple instead of the term.

"(4.) The estate in fee simple so acquired by enlargement shall be subject to all the same trusts, powers, executory limitations over, rights, and equities, and to all the same covenants and provisions relating to user and enjoyment, and to all the same obligations of every kind, as the term would have been subject to if it had not been so enlarged.

"(5.) But where any land so held for the residue of a term has been settled in trust by reference to other land, being freehold land, so as to go along with that other land as far as the law permits, and, at the time of enlargement, the ultimate beneficial interest in the term, whether subject to any subsisting particular estate or not, has not become absolutely and indefeasibly vested in any person, then the estate in fee simple acquired as aforesaid shall, without prejudice to any conveyance for value previously made by a person having a contingent or defeasible interest in the term, be liable to be, and shall be, conveyed and settled in like manner as the other land, being freehold land, aforesaid, and until so conveyed and settled shall devolve beneficially as if it had been so conveyed and settled.

"(6.) The estate in fee simple so acquired shall, whether the term was originally created without impeachment of waste or not, include the fee simple in all mines and minerals which at the time of enlargement have not been severed in right, or in fact, or have not been severed or reserved by an inclosure act or award.

"(7.) This section applies to every such term as aforesaid subsisting at or after the commencement of this Act."

And the Conveyancing Act, 1882, enacts as follows:— Stat. 45 & 46 Vict. c. 39.

Sect. 11. "Section 65 of the Conveyancing Act of 1881 shall apply to and include, and shall be deemed to have always applied to and included, every such term as in that section mentioned, whether having as the immediate reversion thereon the freehold or not; but not— Long terms.

"(i.) Any term liable to be determined by re-entry for condition broken; or

"(ii.) Any term created by sub-demise out of a superior term, itself incapable of being enlarged into a fee simple."

Enlargement of Long Terms.

What terms capable of enlargement.

Four conditions are necessary to the enlargement of a term. First, a term to be capable of being converted into an estate in fee simple under this Act must have been originally granted for not less than three hundred years, of which not less than two hundred years are unexpired at the date of the enlargement. Secondly, either no rent or a merely nominal rent must be payable in respect of the term at the time of enlargement. Thirdly, the term may be carved out of an estate of any tenure (*b*), but, if out of a leasehold term, that term must itself be capable of enlargement. And, fourthly, no term can be enlarged if it is liable to be determined by re-entry or condition broken.

Leases for very long terms of years at a more or less substantial ground rent were not uncommon, and are even now occasionally granted in some parts of the country. See *Re Cross's Charity*, 27 Beav. 592; *Re Carr's Trusts*, 6 W. R. 776. Such leases do not, however, come within the provisions above stated. In order that a term may be capable of enlargement into an estate in fee simple, either no rent, or only a nominal rent (*c*), must have been reserved in respect thereof, or, if any substantial rent was originally reserved, such rent must have since been released, or otherwise ceased to be payable. The most common instance in which land is held for a term of years, in respect of which no rent has been reserved, is where there has been a mortgage by demise, and the right of redemption has been foreclosed or barred by possession of the mortgagee. A long term created by a settlement for the purpose of raising portions which has been sold by the trustees, in whom it was originally vested, will also be capable of enlargement.

Persons entitled to enlarge long terms.

Any person beneficially entitled to the possession

(*b*) See the definitions in sect. 2 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41).

(*c*) In *Re Stott and Fry*, 31 W. R. 411, *Fry*, J., said that he could not take judicial notice of the fact that a rent of three shillings per annum was unsaleable, there being no express evidence on the point before him, and he accordingly held that a long term subject to a rent of that amount was not capable of enlargement.

Enlargement of Long Terms.

or to the receipt of the rents and profits of the land in right of the term may enlarge it into a fee simple. The enlargement may, therefore, be effected by a tenant for life or other limited owner. If, however, the person beneficially entitled is a married woman, her husband's concurrence will be necessary, unless (i) she was married after 31st December, 1882; or (ii) her interest in the property was acquired after that date; or (iii) the instrument under which her interest arises declared that the property should be to her separate use. A restraint on anticipation will not deprive a married woman of her power under this section (*d*). It is to be observed that no provision is made for effecting an enlargement on behalf of a person who is under any disability other than coverture.

Enlargement by beneficiary;

Every beneficiary who holds land for a term of years capable of enlargement, may enlarge the term, whether it be vested in trustees or not; and where, as is generally the case where land is settled by deed, and frequently where it is settled by will, the leaseholds are held by trustees upon trusts corresponding to the uses declared of the freeholds, it would seem that the equitable beneficiary will be the proper person capable of effecting the enlargement.

by trustees;

But where trustees are in receipt of the income in right of the term, or where, as in the case of a devise in a will of lands upon trust for sale, lands are vested in them for that purpose, they may enlarge the term. It would appear that in such a case the beneficiaries have a concurrent power of enlargement.

by personal representatives.

The third class of persons entitled to convert a long term into a fee simple are the executors or administrators of a deceased person, provided (as it is conceived) such person was beneficially entitled to possession of the land, or being in receipt of the income as trustee, or having the term vested in him in trust for sale (*e*).

(*d*) This provision carries out the principle of the decision in *Cooper* v. *Macdonald*, 7 Ch. D. 288, where it was held that a restraint on anticipation did not prevent a married woman from barring an entail and acquiring the equitable fee.

(*e*) It would hardly appear to have been the intention of the

Enlargement of Long Terms.

Incumbrances.

The fact of the land being subject to a mortgage or other incumbrance does not affect the power of enlargement, which may be exercised by the mortgagor of a term capable of enlargement without the concurrence or permission of the mortgagee. The enlargement of the term cannot prejudice, and, indeed, may rather improve, the security of the mortgagee. No power is given to mortgagees, unless they are in possession and the right to redeem is barred, to enlarge long terms comprised in their securities.

Effect of enlargement.

On enlargement of a term, the new estate in fee simple will lose all the incidents of the original reversionary fee, and become impressed with all the incidents of the term, and will accordingly vest in the person in whom the term was vested immediately before the enlargement. Although, therefore, a person beneficially entitled may effect an enlargement, notwithstanding that the legal estate in the term is vested in trustees or mortgagees, yet, in either of such cases, the legal estate in fee simple, acquired by enlargement of the term, will vest, not in the person who executes the declaration but in the trustees, or in the mortgagees, as the case may be, and will become subject to the same trusts, equities, &c., as those which attached to the term before the enlargement.

Effect of enlargement when term settled.

The most usual form of settling a terms of years is by reference to the uses declared by the settlement with regard to the freeholds comprised therein. Thus, in a settlement comprising freeholds and leaseholds, whereby the freeholds are limited to the ordinary uses in strict settlement, the leaseholds will be assigned to the trustees of the settlement upon trust to pay the rents (if any) reserved by, and perform the covenants contained in, the leases, and,

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legislature to give to the personal representatives of a deceased person, in whom the term had become vested as sole continuing or surviving trustee, on trusts corresponding to the limitations of the freeholds, a power which the trustee himself did not possess in his lifetime. The strict literal construction of the clause would, however, seem to empower the representatives of any deceased sole trustee to effect an enlargement.

Enlargement of Long Terms.

subject thereto, to hold the leaseholds upon trusts corresponding to the uses declared of the freeholds, so far as the rules of law and equity will permit, with a proviso suspending the absolute vesting of the leaseholds in a tenant in tail by purchase of the freeholds until he shall attain the age of twenty-one years (*d*). In such a case the effect of an enlargement of a term comprised in the settlement will depend upon whether or not the ultimate beneficial interest has become absolutely vested in any person at the time when the enlargement is made. If, under a settlement, freeholds stand limited to the use of A. for life, with remainder to the use of the first and other sons of A. successively in tail, with remainder to the use of B. in fee simple, and a long term of years capable of enlargement has been settled upon trusts, corresponding to the uses of the freeholds, with the usual suspensory proviso, it is obvious that until a son of A. attains the age of twenty-one years, or until A. dies without leaving a son, the ultimate beneficial interest in the term does not become vested in any person. If then A., before a son attains twenty-one years, executes a deed of declaration enlarging the term, he may, under the Act of 1881, sect. 65, subsect. (5), call upon the trustees, in whom the new estate in fee simple will have become vested by virtue of the declaration, to convey and settle the same in like manner as the freeholds, *i. e.*, to the use of A. for life, with remainder to the use of his first and other sons, successively in tail, with remainder to the use of B. in fee; and a disentailing assurance by the eldest son of A. on attaining the age of twenty-one years, with the consent of A. (if living) as protector of the settlement, will be necessary to convert the estate tail in the newly enlarged freeholds into an estate in fee simple.

Where beneficial interest in term is not vested.

Until such conveyance and settlement shall be effected, the legal estate will remain in the trustees,

(*d*) For form of declaration of trusts of leaseholds to correspond with uses of freeholds, and of proviso suspending the vesting of leaseholds for years until a *quasi* tenant in tail attains twenty-one, see *post*, tit. SETTLEMENTS, in a subsequent volume of this work.

Enlargement of Long Terms.

but the beneficial interest will devolve as the freeholds.

Where beneficial interest in term is vested.

Inasmuch, however, as leaseholds (not being realty) are incapable of being entailed, the eldest son of A., who becomes tenant in tail of the freeholds, will, on attaining the age of twenty-one years, become absolutely entitled to the leaseholds, or in the words of the statute, "the beneficial interest in the term will become absolutely and indefeasibly vested" in him.

Sub-sect. (5) will not apply to this case, and the effect of an enlarging declaration will be to vest the legal estate in the new fee simple in the trustees upon the same trusts "as the term would have been subject to if it had not been so enlarged" (see sub-sect. (4)), *i. e.*, upon trust for A. for life, with remainder upon trust for his eldest son absolutely; the son will thus acquire a vested reversionary beneficial estate in fee simple in the newly enlarged freeholds without the necessity for any disentailing assurance. The father and son may then call on the trustees to execute a conveyance of the legal estate, in accordance with the established rule of law. See *Payne* v. *Barker*, Sir O. Bridg. Rep. 24, and Lewin on Trusts, 585. So, also, if A. dies without having a son who attains twenty-one years of age, or dies under that age, leaving heritable issue, B., on becoming entitled to the leaseholds comprised in the settlement, may execute an enlarging declaration, and require the trustees to convey to him the legal estate (*e*).

If, however, B. has during his lifetime mortgaged his contingent reversionary interest, the effect of his declaration on coming into possession will be to vest the legal estate in the enlarged freeholds in the trustees subject to the mortgage, and to the trusts, powers, equities and obligations expressed in or implied by the mortgage deed.

(*e*) But a trustee so called on to convey the legal estate should ascertain that the succession duty to which the property is subject has been provided for, as otherwise he will be personally liable in respect of it. See the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 44.

PRECEDENTS.

I. *ENLARGEMENT of a* Term *of Years by absolute* Legal *and* Beneficial Owner, *by Endorsement on the Conveyance to him of the Leaseholds.*

KNOW ALL MEN BY THESE PRESENTS, that the within-named [*owner*], as the person beneficially entitled in right of the within-mentioned term of five hundred years, to the possession or receipt of the rents and profits of the lands comprised in the said term, hereby declares that from and after the execution of these presents, the said term of five hundred years shall be, and the same is hereby enlarged into a fee simple. IN WITNESS, &c. Declaration of enlargement.

II. *ENLARGEMENT of a* Term *by* Executors *of a Deceased Owner by Deed Poll supplemental to a Conveyance of the Leaseholds to the Testator.*

TO ALL TO WHOM THESE PRESENTS SHALL COME [*executor*], of ———, in the county of ———, Esquire, and the Rev. [*executor*], of ———, in the county of ———, clerk in holy orders, send greeting. WHEREAS these presents are supplemental to an indenture (hereinafter called the principal indenture) dated the ——— day of ———, 18—, and made between [*vendor*], of the one part, and [*testator*], of the other part, whereby all that messuage or dwelling-house and the orchard and close adjoining thereto, situate at ———, in the county of ———, and in the principal indenture more particularly described, were assigned to the said [*testator*] for the residue of a term of five hundred years created therein, together with other lands, by an indenture of lease, dated the ——— day of ———, 1760, and made between [*parties*] at *Exordium.*

Recitals: of assignment of term to testator;

II. By Executors by Deed Poll.

a peppercorn rent, and the said indenture of lease contains no clause or provision whereby the said term is liable to be determined by re-entry: And whereas the said [*testator*] duly made and executed his will, dated the ——— day of ———, 18—, and thereby, after giving the several specific and pecuniary legacies therein mentioned, gave, devised and bequeathed all the residue of his real and personal estate to the said [*executors*], upon the trusts declared by his said will, and the said [*testator*] thereby appointed the said [*executors*] to be the executors thereof: And whereas the said [*testator*] died on the ——— day of ———, 1881, being at the date of his death entitled to the messuage or dwelling-house and lands comprised in the principal indenture for the residue of the said term, and without having revoked or altered his said will, which was on the ——— day of ———, 18—, duly proved by the said [*executors*] in the Principal Registry of the Probate Division of her Majesty's High Court of Justice. NOW THESE PRESENTS WITNESS, that the said [*executors*], as such personal representatives as aforesaid, do, and each of them doth hereby, declare that from and after the execution of these presents, the said term of five hundred years shall be and the same is hereby enlarged into a fee simple as to the said messuage and premises comprised in the principal indenture. In witness, &c.

of will of testator.

Death of testator, and probate of will.

Testatum.

Declaration of enlargement.

III. *ENLARGEMENT of a* Term *by a* Tenant for Life *of a* Settled Estate *by Deed Poll supplemental to the Settlement.*

Exordium.

TO ALL TO WHOM these presents shall come [*tenant for life*], of ———, in the county of ———, Esquire, sends greeting. Whereas these presents are supplemental to an indenture of settlement, hereinafter called the principal indenture, dated the ——— day of ———, 18—, and made between [*parties*]: And whereas the said [*tenant for life*] is now, under or by virtue of the principal indenture, beneficially entitled, in right of the term of five hundred years therein mentioned, to the possession or receipt of the rents and profits of, among other lands and hereditaments, the

Recitals: of settlement;

of title of tenant for life to term.

lands comprised in the said term. NOW THESE PRESENTS WITNESS, that the said [*tenant for life*], as the person so beneficially entitled as aforesaid, hereby declares that from and after the execution of these presents the said term of five hundred years shall be and the same is hereby enlarged into a fee simple. IN WITNESS, &c.

III. By Tenant for Life.

Testatum.

Declaration of enlargement.

IV. *CONVEYANCE of* SETTLED LANDS, *a* TERM *wherein has recently been* ENLARGED, *to the* USES *of the* SETTLEMENT, *by Indenture supplemental to the Settlement and to the Deed of Enlargement* (see Precedent III.), *where the Remainderman has acquired an Absolute Interest.*

THIS INDENTURE, made the ——— day of ———, 18—, BETWEEN [*trustee*], of &c., and [*trustee*], of &c., of the first part; [*tenant for life*], of &c., of the second part; and [*tenant in fee in remainder*], of the third part. WHEREAS these presents are supplemental to an indenture of settlement, hereinafter called the principal indenture, and made between [*parties*], and also supplemental to a deed poll, hereinafter called the deed of enlargement, under the hand and seal of the said [*tenant for life*], whereby a term of five hundred years, mentioned in the principal indenture, was enlarged into a fee simple as to the lands and hereditaments hereinafter expressed to be hereby conveyed: AND WHEREAS under or by virtue of the operation of the principal indenture and of the deed of enlargement, the said hereditaments hereby conveyed are now vested in the said [*trustees*] in fee simple, upon trust for the said [*tenant for life*] for his life, with remainder upon trust for the said [*tenant in fee*], who attained the age of twenty-one years on the ——— day of ———, 18—, absolutely: AND WHEREAS the said [*tenant for life*] and [*tenant in fee*] have requested the said [*trustees*] to execute such conveyance of the premises as is hereinafter contained, to the intent that the said premises may be settled in like manner as the other lands, being freeholds comprised in the principal indenture. NOW THIS INDENTURE WITNESSETH, that in consideration of

Parties.

Recitals: settlement and deed of enlargement;

that enlarged term is vested in trustees.

Request that enlarged term be settled.

Testatum.

IV. Conveyance of Enlarged Term to Uses of Settlement.

the premises, and at the request and by the direction of the said [*tenant for life*] and [*remainderman*], testified by their respective execution of these presents, they the said [*trustees*] as trustees, hereby convey to the said [*tenant for life*], ALL the lands and hereditaments the fee simple whereof was acquired and vested in them by virtue of the deed of enlargement, TO HOLD the same premises unto the said [*tenant for life*], and his heirs, TO THE USES, upon the trusts, and with, under, and subject to the powers, provisions, and declarations contained in the principal indenture, or such of the same as are now subsisting and capable of taking effect (*f*). IN WITNESS, &c.

Parcels.

Habendum.

V. *DEED OF ENLARGEMENT of a* TERM *and of* CONVEYANCE *of the* FEE SIMPLE *thus acquired to the* USES *of a* SETTLEMENT, *where no Tenant in Tail has attained Twenty-one Years of Age (by Endorsement on the Settlement).*

THIS INDENTURE, made the ——— day of ———, 18—, BETWEEN the within-named [*tenant for life*], of the one part; and the within-named [*trustee*] and [*trustee*], of the other part. WHEREAS no person entitled under the limitations contained in the within-written indenture, as tenant in tail in remainder to the freehold hereditaments thereby settled has attained the age of twenty-one years: AND WHEREAS the said [*tenant for life*] is now, under or by virtue of the within-written indenture, beneficially entitled

Parties.

Recitals: no one absolutely entitled to term;

title of tenant for life.

Resettlement.

(*f*) Or if a resettlement is in contemplation,

TO SUCH USES, upon such trusts, and with, under, and subject to such powers, provisions, and declarations as the said [*tenant for life*] and [*remainderman*] shall by deed jointly appoint, and in default of such joint appointment, and so far as no such joint appointment shall extend, TO SUCH USES, &c. as the said [*remainderman*] shall, after the death of the said [*tenant for life*], by deed or will or codicil appoint, and in default of such appointment, and so far as no such appointment shall extend, TO THE USES, &c. [*as in the text*].

V. Enlargement of Term and Conveyance to Uses of Settlement.

in right of the term of five hundred years therein mentioned to the possession or receipt of the rents and profits of, among other lands and hereditaments, the lands comprised in the said term. NOW THIS INDENTURE WITNESSETH, that the said [*tenant for life*], as the person so beneficially entitled as aforesaid, hereby declares that from and after the execution of these presents, the said term shall be and the same is hereby enlarged into a fee simple. AND THIS INDENTURE ALSO WITNESSETH, that for the purpose of settling the fee simple acquired by the enlargement of the said term, in the manner in which the same is liable to be settled, the said [*trustees*], as trustees, hereby convey to the said [*tenant for life*], ALL the lands and premises, the fee simple whereof has been acquired and vested in them by virtue of the declaration hereinbefore contained, TO HOLD the same premises unto the said [*tenant for life*], and his heirs, TO THE USES, upon the trusts, and with, under and subject to the powers, provisions and declarations contained in the within-written indenture, or such of the same as are now subsisting and capable of taking effect. IN WITNESS, &c.

Testatum.

Enlargement of term.

Further *Testatum.*

Conveyance to uses of settlement.

Parcels.

Habendum.

EXCHANGE.

PRELIMINARY REMARKS.

Exchanges generally.

EXCHANGES of lands and hereditaments may be effected (i) by deed of exchange operating by common law; (ii) by mutual conveyances; or (iii) by an order of the Land Commissioners.

Exchanges at common law.

An exchange at common law is an assurance, by means of which two persons, severally seised of lands, mutually grant them in exchange, each his own land for the land of the other.

Requisites.

Exchanges at common law, being now of such rare occurrence as to be practically obsolete, may be very briefly treated. To the validity of such exchanges five things are requisite:—

What things may be exchanged.

1st. That the two subjects be of the same nature. Thus, land may be exchanged for land, and chattels for chattels, but not real for personal estate: Perk. sects. 261, 262, 263; Shepp. Touch. 292; though real estate of one kind may be exchanged for real estate of another kind. Corporeal hereditaments may therefore be exchanged for incorporeal hereditaments, or land for a fee-farm rent: Co. Litt. 50 b.

Equality of estate.

2ndly. That the parties take an equal estate. Thus, an estate in fee cannot be exchanged for an estate for life, or in tail: Co. Litt. 51 a.

Word "exchange" must be used.

3rdly. In order to give an instrument the operation of an exchange, the word "exchange" must be used: Co. Litt. 51 a.

Entry.

4thly. Entry (but not livery of seisin) is also requisite to give effect to an exchange; and therefore, if either party die before entry, his heir may

avoid the exchange. Co. Litt. 51 b.; Perk. sect. 284; Shepp. Touchst. 296 (*a*). **Exchanges at Common Law.**

5thly. An exchange of any tenements or hereditaments, not being copyhold, made after the 1st of October, 1845, must be by *deed*. See stat. 8 & 9 Vict. c. 106, s. 3. Writing and deed.

It will be obvious from what has been said of the nature of an exchange, that it can only take place between two sets of parties. Thus, where A. conveys lands to B., B. to C., and C. to A., this is not an exchange: *Provost of Eton* v. *Bishop of Winchester*, 3 Wils. 491; 2 Wm. Blackst. 936; Lofft, 401. But either party may consist of several persons; thus, tenants in common, or joint-tenants, may exchange with third persons: *Anon.*, Lofft, 414. Two sets of parties only.

Formerly, a distinguishing but inconvenient feature of this mode of assurance was the implied mutual warranty and right of re-entry, which were incident to exchanges, whereby either party, in case of eviction, was entitled to enter upon the lands given in exchange for those from which he has been evicted. But now, by sect. 4 of the stat. 8 & 9 Vict. c. 106, it is provided that an exchange of any tenements or hereditaments made after the 1st of October, 1845, shall not imply any condition in law. Right of re-entry in case of eviction from lands taken in exchange.

Exchanges by mutual conveyances have none of the peculiar properties of common-law exchanges: *Bartram* v. *Whichote*, 6 Sim. 92. Where A. agreed to purchase an estate from B. at a valuation, and by the same memorandum B. agreed to purchase an estate from A. at a valuation, and A. failed to make a title to the estate which he agreed to sell to B.; it was held, that the contracts were independent, and that B. was entitled to specific fulfilment of A.'s contract to purchase from him; and parol evidence that an exchange was intended was rejected: *Croome* v. *Lediard*, 2 My. & K. 251. Exchanges by mutual conveyances.

(*a*) An agreement for an exchange, although partly performed by payment of a sum for equality of partition, does not make the infant heir of one of the parties dying a trustee within the provisions of the statute, 11 Geo. 4 & 1 Will. 4, c. 60: *Turner* v. *Edgell*, 1 Keen. 502.

Exchanges by Mutual Conveyances.

The mutual conveyances may be effected either by two separate and distinct deeds, or by one deed engrossed and executed in duplicate.

Whether an appointment can operate as an exchange.

Though it is not necessary that both parties to the exchange should come to the given thing "by the same means and manner of assurance," and therefore, if lessee for life of one acre give another acre to his lessor in tail, in exchange for a release from him of that acre, to hold in tail in like manner, this is a good exchange: Shepp. Touchst. 295; yet it is apprehended that where the instrument operates, in respect of the lands conveyed by either party, as an appointment, this is not an exchange at common law; for, even admitting that an instrument operating under the Statute of Uses can have effect as an exchange (which has been questioned), yet, as in the present instance, the appointee is in immediately under the instrument creating the power, and not under the deed by which it is exercised, there is a want of that mutuality between him and the other party which is of the essence of an exchange.

Conveyances under usual power of exchange.

Conveyances made under the ordinary powers to make exchanges contained in settlements, and which necessarily take effect as appointments, operate as mutual conveyances only, and not as exchanges at common law.

For further information on the subject of exchanges, the reader may consult the title "Exchange," in the Abridgments of Viner and Bacon, and Prest. Sheppard's Touchst. 289.

Exchanges under Enclosure Acts.

Exchanges are now very commonly effected by order of the Land Commissioners for England and Wales under the Enclosure Acts. Recourse cannot, however, be had to these Acts where the inequality in value of the two properties exceeds one-eighth. The provisions of those Acts relating to exchanges of land are stated, and the mode of effecting such exchanges is considered, in the first volume of this work. See tit. AGREEMENTS, Precedent XXVII. p. 520, note (*m*).

Exchanges of settled lands.

By Lord Cranworth's Act (23 & 24 Vict. c. 145) powers of exchange of settled land were given to trustees, but this Act is now repealed without pre-

judice to anything done by instrument executed before the 1st January, 1883. **Exchanges at Common Law.**

The Settled Land Act, 1882 (45 & 46 Vict. c. 38), confers upon tenants for life and other limited owners powers, the nature of which will be fully considered in a subsequent volume of this work, tit. SETTLEMENTS. The powers of exchange given by that Act may accordingly be here very briefly stated. Powers of limited owners to make exchanges of settled lands.

By that Act a tenant for life is empowered to "make an exchange of the settled land (*b*), or any part thereof (*c*), including an exchange in consideration of money paid for equality of exchange:" sect. 3.

The exchange must be made for the best consideration obtainable in land or land and money, and may be made subject to any stipulations respecting title or evidence of title or other things; but settled land in England must not be given in exchange for land out of England: sect. 4.

An incumbrance affecting land given in exchange may, with the consent of the incumbrancer, be charged on other parts of the settled land: sect. 5.

On exchange, the minerals and any rights or easements, &c. may be reserved: sect. 17.

Money required for equality of exchange may be raised by mortgage of the settled land: sect. 18.

A tenant for life may effectually convey the land given in exchange: sect. 20.

Where money is required to be paid for equality

(*b*) By 13 & 14 Vict. c. 21, s. 4, it is provided that in Acts of Parliament "land" shall include hereditaments of any tenure, *i.e.*, copyholds and leaseholds as well as freeholds; and by sect. 1 (10) of the Settled Land Act, 1882, land for the purposes of that Act includes incorporeal hereditaments, *e.g.*, manorial rights, rent-charges, tithes, advowsons, rights of way and other easements, and rights of common.

(*c*) By sect. 15 of the Act the principal mansion-house on any settled land and the demesnes, &c. are not to be "*sold* or *leased* by the tenant for life without the consent of the trustees of the settlement or an order of the Court." No such consent or order appears to be necessary to enable a tenant for life to exchange any part of the settled land, whether it comprise the principal mansion-house and demesnes, &c. or not. As to the meaning of the terms "mansion-house, demesnes," &c. used in this section, see *ante*, tit. AGREEMENTS, Vol. I., p. 414, note (*a*). Exchange of mansion-house, park, &c.

Exchanges at Common Law.

of exchange, any capital moneys arising under the Act which may be in the hands of the trustees or in Court, may be applied for the purpose: sect. 21 (iv.).

Any money taken for equality of exchange must be paid to the trustees of the settlement or into Court, at the option of the tenant for life, to be invested or applied as capital money arising under the Act: sect. 22.

Lands acquired in exchange are to be made subject to the settlement: sect. 24.

The receipt of the trustees of the settlement is a sufficient discharge for moneys paid for equality of exchange: sect. 40.

A tenant for life intending to exercise his power of exchange under this Act should give notice (*d*), at least one month previously, to the trustees of the settlement and to their solicitors: sect. 45.

A tenant for life cannot assign or otherwise deprive himself of his power of exchanging settled land, but must not exercise such power to the prejudice of an assignee for value of the interest of the tenant for life: sects. 50, 51.

A person taking settled lands in exchange is protected from any irregularity in the exchange: sect. 54.

The power to exchange is exercisable from time to time, and may be carried into effect by all necessary or proper instruments: sect. 55.

This statutory power is not to prejudice any power conferred by the settlement or any other Act; but in case of conflict between the provisions of the settlement and of this Act, the latter is to prevail: sect. 56.

If a tenant for life is an infant the power may be exercised on his or her behalf by the trustees of

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(*d*) By the Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 5, it is provided that a notice of an intention to make an exchange may be notice of a general intention so to do; but the tenant for life is, upon request by a trustee of the settlement, to furnish to him such particulars and information as may be reasonably required by him from time to time with reference to exchanges effected, or in progress, or immediately intended.

the settlement, or under the order of the Court: sect. 60. Exchanges at Common Law.

Married women may exercise the power, either solely, or jointly with their husbands, according as they are entitled to their separate use or otherwise: sect. 61.

When a tenant for life is a lunatic his committee may, in his name and on his behalf, under an order in lunacy, exercise the power: sect. 62.

Exchanges of glebe lands may be effected under the provisions of the stat. 55 Geo. 3, c. 147, as amended by the stats. 56 Geo. 3, c. 52, and 6 Geo. 4, c. 8, by the incumbent, with the consent of the patron and ordinary, for other lands conveniently situate for occupation, and of greater value, or more conveniently situate than the lands given in exchange. And by the stats. 5 & 6 Vict. c. 54, s. 5, and 9 & 10 Vict. c. 73, s. 22, the Land Commissioners are empowered to effect exchanges of glebe lands, with the consent of the ordinary and patron, and of the landowner having title to the lands given in exchange and being in actual possession thereof. The award of the Commissioners will have the effect of a conveyance. Exchanges of glebe lands.

The Stamp Act, 1870, enacts as follows:— Stamps.

Sect. 94. "Where upon the exchange of any real or heritable property for any other real or heritable property, or upon the partition or division of any real or heritable property, any consideration exceeding in amount or value 100*l.* is paid or given, or agreed to be paid or given, for equality, the principal or only instrument whereby such exchange or partition or division is effected is to be charged with the same *ad valorem* duty as a conveyance on sale for such consideration, and with such duty only; and where in any such case there are several instruments for completing the title of either party the principal instrument is to be ascertained, and the other instruments are to be charged with duty according to the provisions of the 76th and 77th sections of this Act."

In any other case the stamp on an "instrument effecting an exchange" is ten shillings.

PRECEDENTS.

I. *CONVEYANCE of* LANDS *in* EXCHANGE *for other* LANDS *conveyed by a* SEPARATE DEED *of even Date.*

THIS INDENTURE, made the ——— day of ———,

Parties. 18—, BETWEEN [*grantor*], of &c., of the one part, and

Recitals: of agreement to exchange; [*grantee*], of the other part: WHEREAS the said [*grantor*], being seised of the several closes of land and hereditaments, hereby conveyed and described in the first schedule hereunder written, for an estate of fee simple in possession, free from incumbrances, has agreed with the said [*grantee*] to exchange the same for the messuage, lands and hereditaments of the said [*grantee*], described in the second schedule

of execution of deed of even date. hereunder written: AND WHEREAS, in pursuance of the said agreement, by an indenture, bearing even date with these presents, and expressed to be made between the said [*grantee*], of the one part, and the said [*grantor*], of the other part, the said messuage and premises described in the second schedule hereunder written have been [*or* are intended to be] conveyed unto and to the use of the said

Testatum. [*grantor*], his heirs and assigns. NOW THIS INDENTURE WITNESSETH, that in further pursuance of the

Conveyance. said agreement, and in consideration of such conveyance as aforesaid of the said messuage and premises described in the second schedule hereunder written, the said [*grantor*], as beneficial owner, hereby conveys unto the said [*grantee*], his heirs and assigns, ALL those the several closes or pieces of land and hereditaments situate in the parish of ———, in the county of ———, which last-mentioned premises are particularly described in the first schedule hereunder written, TO HOLD all the said premises hereby conveyed UNTO AND TO THE USE OF the said [*grantee*], his heirs and assigns, for ever. IN WITNESS, &c.

THE FIRST SCHEDULE ABOVE REFERRED TO.

THE SECOND SCHEDULE ABOVE REFERRED TO.

II. *CONVEYANCE of Lands (part being Copyholds) by way of* EXCHANGE *by a single Deed, where* MONEY *is paid by one of the Parties for* EQUALITY *of* EXCHANGE.

THIS INDENTURE, made the ——— day of ———, 18—, BETWEEN [A. B.], of &c., of the one part, and [C. D.], of &c., of the other part: WHEREAS the said [A. B.] is seised of the several messuages, lands and hereditaments described in the first schedule hereunder written for an estate of fee simple in possession, free from incumbrances: AND WHEREAS the said [C. D.] is seised of the several messuages, lands and hereditaments described in the second schedule hereunder written, as to such of the same premises as are described in the first part of the said second schedule, being freeholds, for an estate of fee simple, and as to such of the same premises as are described in the second part of the said second schedule, being copyholds of the manor of ———, in the county of ———, for an estate of inheritance according to the custom of the said manor, in possession, free from incumbrances: AND WHEREAS the said [A. B.] and [C. D.] have agreed to effect such exchange as is hereinafter contained of the said premises described in the first and second schedules hereunder written respectively, and upon the treaty for the said exchange it was agreed that the said [C. D.] should pay to the said [A. B.] the sum of £——— for equality of exchange: AND WHEREAS the deeds and documents specified in the third schedule hereunder written relate not only to the said premises described in the first schedule hereunder written, but also to other lands and hereditaments of the said [A. B.]; and the deeds and writings specified in the fourth schedule hereunder written relate not only to the said premises described in the second schedule hereunder written, but also to other lands and hereditaments of the said [C. D.]; and it has been agreed that the said deeds and documents specified in the said third schedule shall be retained by the said [A. B.], and that the said deeds and documents specified in the said fourth schedule shall be retained by the said [C. D.], and that each of them, the said [A. B.] and [C. D.], shall give to the other such acknowledgment and undertaking with regard to the deeds and documents retained by each of them respectively as is hereinafter

Parties.

Recitals: of seisin;

of agreement for exchange;

of agreement that deeds, &c. shall be retained by respective parties.

II. Exchange by a Single Deed.

contained. NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement for an exchange, and in consideration of the grant and covenant to surrender hereinafter respectively made and entered into by the said [C. D.] of the several messuages, lands, and hereditaments described in the second schedule hereunder written, and also in consideration of the sum of £———, upon the execution of these presents paid by the said [C. D.] to the said [A. B.] (the receipt whereof the said [A. B.] hereby acknowledges), the said [A. B.], as beneficial owner, hereby grants and conveys unto the said [C. D.], his heirs and assigns, ALL THOSE the several messuages, lands, tenements, and hereditaments situate in the parish of ———, in the county of ———, which last-mentioned premises are particularly described in the first schedule hereunder written: TO HOLD all the same premises UNTO AND TO THE USE OF the said [C. D.], his heirs and assigns, for ever.

First *testatum*. Grant of lands in first schedule.

Second *testatum*. Grant of freehold lands in second schedule.

AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance of the said agreement, and in consideration of the grant hereinbefore made by the said [A. B.] of the several messuages, lands, and hereditaments described in the first schedule hereunder written, the said [C. D.], as beneficial owner, hereby grants and conveys unto the said [A. B.], his heirs and assigns, ALL THOSE the several messuages, lands, and hereditaments situate in the parish of ———, in the county of ———, which last-mentioned premises are particularly described in the first part of the second schedule hereunder written: TO HOLD all the same premises, UNTO AND TO THE USE OF the said [A. B.], his heirs and assigns, for ever.

Third *testatum*. Covenant to surrender copyholds in second schedule.

AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance of the said agreement, and for the consideration last aforesaid, the said [C. D.], as beneficial owner, hereby covenants with the said [A. B.] that he the said [C. D.], or his heirs, and all other necessary parties, will forthwith, at the cost of the said [A. B.], his heirs or assigns, surrender or cause to be surrendered into the hands of the lord of the said manor of ———, according to the custom thereof, ALL THOSE the several pieces of land and hereditaments situate in the parish of ——— aforesaid, which last-mentioned premises are particularly described in the second part of the second schedule hereunder written: TO THE USE of the said [A. B.], his heirs and assigns, for

ever, according to the custom of the said manor, at, by, and under the rents, fines, heriots, suits, and services therefor due and of right accustomed: AND THAT until the same premises shall be duly surrendered in pursuance of this covenant, the said [C. D.] and his heirs will stand seised thereof in trust for the said [A. B.], his heirs and assigns. AND the said [A. B.] hereby acknowledges the right of the said [C. D.] to the production of the several deeds and documents specified in the third schedule hereunder written, and to delivery of copies thereof, and hereby undertakes for the safe custody thereof. AND the said [C. D.] hereby acknowledges the right of the said [A. B.] to production of the several deeds and documents specified in the fourth schedule hereunder written, and to delivery of copies thereof, and hereby undertakes for the safe custody thereof. IN WITNESS, &c.

II. **Exchange by a Single Deed.**

Declaration of trust until surrender.

Acknowledgment, &c. as to documents in third schedule.

Acknowledgment, &c. as to documents in fourth schedule.

THE SCHEDULES ABOVE REFERRED TO.

III. *CONVEYANCE* OF FREEHOLDS *to* TRUSTEES *to the* USES *of a* SETTLEMENT *in* EXCHANGE *for* SETTLED LANDS, *conveyed by the Tenant for Life thereof by a Deed of even Date.*

THIS INDENTURE, made between [*grantor*], of &c., of the first part; [*tenant for life*], of &c., of the second part; and [*trustees of the settlement*], of the third part: WHEREAS the said [*grantor*] is seised of the lands and hereditaments described in the first schedule hereunder written for an estate in fee simple in possession free from incumbrances: AND WHEREAS by an indenture dated the ——— day of ———, 18—, and expressed to be made between [*parties*] (being a settlement made in consideration of the marriage afterwards solemnized between the said [*tenant for life, and his wife*]), the lands and hereditaments described in the second schedule hereunder written were with other hereditaments limited and assured, from and after the solemnization of the marriage, to the use of the said [*tenant for life*], for his life, with divers remainders over: AND WHEREAS the said [*trustees*] are the present trustees of the settlement within the meaning of the Settled Land Act, 1882: AND WHEREAS it has been

Parties.

Recitals: of seisin of grantor;

of seisin of tenant for life of settled lands;

of agreement for exchange;

III. Exchange by Tenant for Life.

agreed by and between the parties hereto that the said [*grantor*] should convey the hereditaments described in the first schedule hereunder written, in fee simple in possession, free from incumbrances, unto the said [*trustees*], in manner hereinafter appearing, in consideration of the conveyance by the said [*tenant for life*], as such tenant for life as aforesaid, of the hereditaments described in the second schedule hereunder written (being part of the settled land comprised in the said settlement), and in further consideration of the sum of £——— to be paid for equality of exchange by the said [*trustees*] to the said [*grantor*] out of moneys in their hands, being capital money arising under the said Settled Land Act: And whereas in pursuance and part performance of the said agreement, by an indenture bearing even date with these presents, and expressed to be made between the said [*tenant for life*], of the one part, and the said [*grantor*], of the other part, the said [*tenant for life*], in exercise of the power in that behalf given to him by the said Settled Land Act, conveyed unto and to the use of the said [*grantor*], in fee simple in possession, free from incumbrances, the hereditaments described in the second schedule hereunder written, as the said [*grantor*] hereby acknowledges. NOW THIS INDENTURE WITNESSETH, that in further pursuance of the said agreement, and in consideration of the premises, and in further consideration of the sum of £———, upon the execution of these presents, paid to the said [*grantor*] by the said [*trustees*], with the consent (hereby testified) of the said [*tenant for life*] (the receipt of which sum the said [*grantor*] hereby acknowledges), the said [*grantor*], as beneficial owner, conveys unto the said [*trustees*], All those the lands and hereditaments situate at ———, in the county of ———, which are particularly described in the first schedule hereunder written, To hold the premises hereinbefore expressed to be hereby conveyed unto the said [*trustees*], and their heirs, to such of the uses, upon such of the trusts, and with, under, and subject to such of the powers, provisions, and declarations in and by the said indenture of settlement expressed, declared, and contained of and concerning the lands and hereditaments therein comprised as are now subsisting and capable of taking effect. In witness, &c.

of conveyance of lands given in exchange.

Testatum.

Conveyance of lands in first schedule to trustees.

The First Schedule above referred to.

The Second Schedule above referred to.

IV. *APPOINTMENT and* CONVEYANCE *by way of* EXCHANGE *by a single Deed. Trustees of a Settlement appoint* LANDS *in* EXCHANGE *for other Lands conveyed by the same Deed by a Tenant for Life under a Will in exercise of his Statutory Power: the Trustees of the Will join for the purpose of acknowledging the receipt of Moneys paid for Equality of Exchange.*

THIS INDENTURE, made the ——— day of ———, 18—, BETWEEN [*trustee of settlement*], of &c., and [*trustee of settlement*], of &c., of the first part; [*tenant for life under settlement*], of &c., of the second part; [*tenant for life under will*], of &c., of the third part; and [*trustee of will*], of &c., and [*trustee of will*], of &c., of the fourth part: WHEREAS by an indenture of settlement, dated the ——— day of ———, 18—, and expressed to be made between [*parties*], (being the settlement made in consideration of the marriage, which was shortly afterwards solemnized between the said [*tenant for life under settlement*] and [*wife*]), the lands and hereditaments described in the first schedule hereunder written were, with other hereditaments, conveyed and assured, from and after the solemnization of the said then intended marriage, to the use of the said [*tenant for life under settlement*] for his life, with divers remainders over as therein mentioned; And in the indenture now in recital was contained a power [*recite power of exchange verbatim, e.g.*] for the said [*original trustees of the settlement*], and the survivor of them, and the executors or administrators of such survivor, or other the trustees or trustee for the time being of the same indenture, during the life of the said [*tenant for life under settlement*], with his consent in writing, to exchange for other manors, lands, or hereditaments in England or Wales, all or any of the lands and premises thereby assured, and upon any such exchange, to give or receive any money for equality of exchange, and for the purpose aforesaid, to revoke the uses and trusts of the said lands and premises thereby assured, or any of them, or any part thereof respectively, and to appoint any new uses and trusts thereof: AND WHEREAS the said ——— [*an original trustee of the settlement*], died on the —— day of ——, 18—, and by an indenture dated the ——— day of ———,

Parties.

Recitals: of settlement;

of death of trustee and appointment of successor;

IV. Exchange by Appointment under a Power.

18—, and expressed to be made between [*parties*], the said [*trustee of settlement*], was duly appointed to be a trustee of the hereinbefore recited indenture of settlement:

of will;

And whereas under or by virtue of the will of [*testator*], late of &c., deceased, dated &c., and proved &c., the said [*tenant for life under will*] is seised of, or entitled to, among other hereditaments, the lands and hereditaments described in the second schedule hereunder written, as tenant for life in possession, free from incumbrances:

of appointment of "trustees of the settlement" created by the will;

And whereas by an order dated the ——— day of ———, 18—, and made on the application of the said [*tenant for life under will*], by his lordship, Sir [A. B.], one of the Justices of the Chancery Division of Her Majesty's High Court of Justice, the said [*trustees of will*] were appointed trustees of the settlement created by the will of the said [*testator*] for the purposes of the Settled Land Acts:

of agreement for exchange;

And whereas it has been agreed between the said [*trustees of settlement*], with the consent of the said [*tenant for life under settlement*], on the one part, and the said [*tenant for life under will*], on the other part, that such an exchange shall be effected as is hereinafter contained of such of the said lands and premises comprised in the hereinbefore recited indenture of settlement as are described in the first schedule hereunder written, for such of the lands and premises devised by the said will of the said testator, as are described in the second schedule hereunder written:

of agreement for payment of equality money;

And whereas upon the treaty for the said exchange, it was agreed that the said [*trustees of settlement*] should pay to the said [*trustees of will*] the sum of £——— for equality of exchange, and that the said [*trustees of will*] should join in these presents for the purpose of acknowledging the receipt of the said sum in manner hereinafter appearing:

of agreement as to deeds.

And whereas [*recite agreement that deeds, &c., relating to the premises comprised in the settlement and will respectively, other than those exchanged, shall be retained by the respective tenants for life, who are to give mutual acknowledgments and undertakings, ante*, p. 931].

Testatum.

NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement for an exchange, and in consideration of the conveyance hereinafter contained of the lands and hereditaments described in the second schedule hereunder written, the said [*trustees of settlement*], with the consent of the said [*tenant for life under settlement*], testified by his execution of these presents, in exercise of the power in this behalf given to them

Appointment of lands by trustees of settlement.

IV. Exchange by Appointment under a Power.

by the said indenture of settlement, and of every other power (if any) them hereunto enabling, do hereby, so far only as relates to the lands and hereditaments, situate &c., and described in the first schedule hereunder written, revoke the uses and trusts thereof declared by the said indenture of settlement, and do hereby, as trustees, limit and appoint that the same lands and hereditaments shall henceforth go, remain, and be TO SUCH USES, and upon such trusts, and with, under, and subject to such powers, provisions, and declarations as the lands and hereditaments described in the second schedule hereunder written were subject to, under or by virtue of the will of the said [*testator*], immediately before the execution of these presents. AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance of the said agreement for an exchange, and in consideration of the appointment hereinbefore made of the lands and hereditaments described in the first schedule hereunder written, and also in consideration of the sum of £———, upon the execution of these presents by the said [*trustees of settlement*], with the consent of the said [*tenant for life under settlement*], testified as aforesaid, and by the direction of the said [*tenant for life under will*], testified by his execution of these presents, paid to the said [*trustees of will*] (the receipt of which sum of £———, the said [*trustees of will*] hereby acknowledge), the said [*tenant for life under will*], as beneficial owner, and in exercise of the power vested in him under or by virtue of the Settled Land Act, 1882, and of all other powers and authorities (if any) him hereunto enabling, hereby conveys unto the said [*trustees of settlement*], and their heirs, ALL THOSE the lands and hereditaments, situate &c., and described in the second schedule hereunder written, TO HOLD the same premises UNTO the said [*trustees of settlement*], and their heirs, TO SUCH USES, upon such trusts, and with, under, and subject to such powers, provisions, and declarations as the lands and hereditaments described in the first schedule hereunder written were subject to, under, or by virtue of the hereinbefore recited indenture of settlement, immediately before the execution of these presents. [*Add mutual acknowledgments and undertakings by the tenants for life as to deeds, &c., retained by them respectively, ante*, p. 933.] IN WITNESS, &c.

Further *testatum.*

Conveyance by way of exchange by tenant for life under will.

THE SCHEDULES ABOVE REFERRED TO.

INDEMNITY.

PRELIMINARY REMARKS.

Of indemnities generally.

It is often necessary or convenient, on the occasion of sales of land and other transactions, that one party should receive from the other an indemnity to secure the former from all risk and damage that may ensue from the acts of the latter, or persons claiming under him, or from the omission to do some act which the former is in strictness by law required to do or might have required to be done by the latter. For most ordinary purposes indemnities are given by covenants inserted in the principal deed by which the transaction requiring the indemnity is effected, but cases not unfrequently arise in practice where the person who is to receive the indemnity requires it to be made by means of a separate deed.

When given by a separate instrument.

Separate indemnities may be effected either by bond or by deed of covenant, or by creation of a charge by way of rent or otherwise, on land or other property. It is evident that bonds and covenants creating only a personal liability on the obligor or covenantor form a security altogether inferior to indemnities effected by a charge on property. This consideration should be carefully borne in mind by the advisers of persons who propose to take an indemnity, and where the risk is material, a security, by way of charge, should be insisted on, if the nature of the transaction admit of such security being given.

Indemnity among purchasers *inter se* in respect of charges common to all.

Deeds of indemnity are frequently required where lands, subject to a rent-charge or other annual incumbrance, are sold in several lots, under a stipulation that the whole of such charge shall be borne by the purchaser of a particular lot, or shall be distri-

buted among the several purchasers in certain proportions. In such case, as the arrangement is among the purchasers themselves only, the incumbrancer himself being no party to it, the whole of the lands continue liable to *him;* and it therefore becomes necessary to devise the most effectual means of indemnifying the purchasers intended to be exonerated against the consequences of such liability, by investing them with a power of resorting to the property of the purchaser upon whom it is intended the weight shall fall. The mode of effecting this has undergone some variation in modern practice. The plan formerly was simply to reserve a power of distress for the sums which the purchaser should be called upon to pay, and all expenses (*a*): but it is now usual to limit a rent-charge out of the lands intended to be exclusively charged, adequate at least to the amount of the original charge, with powers of distress, and for the perception of rents in case of non-payment; and this rent, where there are several purchasers, is vested in trustees for the benefit of all, in order to prevent the necessity of incumbering the land with a distinct rent to *each* purchaser, which would otherwise be necessary. To this rent sometimes is added a limitation of, or power to limit (*b*), a term of years, with trusts to raise the money by mortgage and sale, as in ordinary annuity deeds; but such a provision clearly cannot be required, and the requisition, if made, ought never to be submitted to.

Deeds for the Indemnity of Purchasers against Charges, &c.

(*a*) That these indemnifying powers of distress are valid, and that they enure for the benefit of the owner for the time being of the lands to be exonerated, seems to have been established at an early period. Though these powers of distress have been much disused in modern practice, yet, where the transaction is small, and the number of purchasers few, so that a separate power of distress can conveniently be introduced into the conveyance of each, instead of limiting a rent to trustees for the benefit of all, a simple power of distress seems to be the most eligible mode of effecting the intention of the parties, especially if the charge, against which protection is sought to be obtained, be determinable on death or any other proximate event: *ut post*, p. 955 *et seq.*

Powers of distress by way of indemnity valid, and run with the land.

(*b*) See as to the insertion in instruments creating rent-charges, &c., of a power to limit a term, sect. 44, sub-sect. 4, of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), stated and considered *ante*, Vol. I. p. 674.

Covenants of Indemnity.

The question as to the provisions which are proper in deeds of this kind was much discussed in the case of *Casamajor* v. *Strode*, 2 Swanst. 347; *Bliss* v. *Collins*, 1 Dowl. & R. 291; and see *ante*, tit. CONDITIONS OF SALE, p. 688.

Covenant to pay money independent of covenant to indemnify against payment.

Where a covenant to indemnify was associated with a covenant to pay the money against the payment of which the indemnity was given, it was decided that the covenants were independent, and that an action would lie for breach of the covenant to pay, although the covenantee had not himself paid the money: *Saward* v. *Anstey*, 10 Moore, 55. See *Lethbridge* v. *Mytton*, 2 B. & Ad. 772. This point may be very important where there is any doubt as to the covenantee's liability to the charges agreed to be paid by the other party; for, according to the construction just mentioned, the proof of his non-liability would be no defence to the action on the covenant to pay; and it will be obvious, that there are cases in which a person may be anxious to obtain an obligation from a third person to the payment of a charge for which he is not himself personally responsible. *Saward* v. *Anstey* was a case of this nature, where A., to whom certain lands had been devised, subject to certain annuities to his sisters, sold the lands, and procured the purchaser to enter into a covenant with him for the payment of the annuities, and to indemnify him therefrom. As these annuities affected the lands merely, and did not charge the devisee personally, the covenant for his personal indemnification was inoperative; and if, therefore, this covenant had been held to restrain the other, the whole would have been nugatory; and this consideration certainly seems to have weighed with the Court.

Frame of covenants of indemnity.

The case suggests, that, in preparing covenants of this kind, care should be taken distinctly to show (if such be the intention) that they are meant to be independent; and, to avoid the possibility of a contrary construction, it may sometimes even be advisable to repeat the names of the parties, and the operative words of covenant. A covenant by A. to indemnify B. from certain debts, coupled with

Covenants of Indemnity.

a recital in the same deed of an agreement that A. should pay the debts, was held to amount to a covenant to pay as well as to indemnify: *Carr* v. *Roberts*, 5 B. & Ad. 78. See *Huntley* v. *Sanderson*, 1 Cr. & M. 467.

Whether a covenant to pay rent runs with the land.

Where the grant of a rent-charge, whether for the purpose of indemnity or otherwise, is accompanied by a covenant from the owner of the land for payment of it, the value of such covenant, of course, depends much upon whether it runs with the land and with the rent; or, in other words, whether the owner of the land for the time being is liable to an action upon the covenant, at the suit of the owner of the rent for the time being. These are distinct points. In regard to the former, the case of *Roach* v. *Wadham*, 6 East, 289, has been considered as establishing, that where a person who has a power of appointment over lands, with or without an estate in default of appointment, grants a rent, covenanting to pay such rent, and then exercises his power, his appointee is not bound by the covenant, *there being no privity between the covenantee and appointee, as the latter, according to a well-known doctrine, is* IN *immediately under the deed creating the power.* The inference deducible from this case is, that if the grantor of the rent had conveyed the land by virtue of his ownership, instead of exercising his power, his alienee would have been bound by the covenant: a doctrine which, though encountered by a *dictum* of Lord *Holt* (see *Brewster* v. *Kitchell*, Salk. 198; 1 Ld. Raym. 322; 5 Mod. 369), certainly accords with the generally received opinion of the profession on the subject. The second point has not been determined. See *Milnes* v. *Branch*, 5 Mau. & S. 417; *Bally* v. *Wells*, 3 Wils. 25; *Earl of Portman* v. *Bunn*, 1 B. & Cr. 694. These points will be particularly discussed under the title PURCHASE DEEDS, in connexion with the subject of covenants running with the land generally; *Keppel* v. *Bailey*, 2 Myl. & K. 517; *Duke of Bedford* v. *British Museum*, Id. 552; *Riddell* v. *Riddell*, 2 Sim. 529; and the valuable note to *Spencer's case*, Smith's Leading Cases, Vol. I. p. 68 *et seq.*

Appointee not bound.

Remarks upon *Roach* v. *Wadham*.

Indemnity against Rent.

As to bonds, &c. of indemnity against the payment of rent.

As the assignment of a lease (though followed by the lessor's acceptance of rent from the assignee) does not discharge the lessee from his express covenants, it is usual for the assignee to give him an indemnity against these covenants, either by bond, or, according to the usual practice, by a covenant inserted in the assignment itself. This deed, however, is commonly in the custody of the covenantor (the assignee), and a bond is, therefore, sometimes preferred.

Implied obligation.

But it is clear, that, even without an express contract, the law will raise an implied obligation in the assignee of a lease to indemnify the lessee against claims for non-payment of the rent, or breaches of the covenants contained in the lease: *Burnett* v. *Lynch*, 5 B. & C. 589; *Close* v. *Wilberforce*, 1 Beav. 112; *Moule* v. *Garrett*, L. R., 7 Ex. 101. In an action by an assignor of a lease against the assignee, for indemnity in respect of breach of covenants in the lease, the Court will only direct payment on account of breaches already committed, and will not make a general declaration of the assignor's right to indemnity: *Lloyd* v. *Dimmack*, 7 Ch. D. 398.

Proper form of indemnity on assignment of lease.

As to the indemnity proper to be given by an assignee to an assignor, who is himself an assignee only, see *Staines* v. *Morris*, 1 Ves. & B. 8. The trustee of a bankrupt lessee cannot require a purchaser of the lease to enter into a covenant to indemnify either the trustee or the bankrupt: *Wilkins* v. *Fry*, 1 Mer. 244. The implied obligation of the assignee to indemnify the lessee, only extends to breaches committed during the assignee's possession, upon which actions may be commenced after the assignee has assigned over: *Harley* v. *King*, 2 C., M. & R. 18; but if he has covenanted generally to indemnify the lessee from the rent and covenants, he cannot get rid of that liability by assigning over. An assignment, "*subject to* the payment of the rent and performance of the covenants," does not imply such a covenant: *Wolveridge* v. *Steward*, 1 Cr. & Mee. 644. See *Chancellor* v. *Poole*, 2 Doug. 767; *Hancock* v. *Caffyn*, 1 Moo. & Sc. 521. See

Indemnity: Effect of Bankruptcy.

further, as to covenants of indemnity on the purchase of leaseholds, *post*, tit. PURCHASES.

Stamps on bonds of indemnity.

The stamp on a bond or deed of indemnity is 10*s*. In the case of *Lopez* v. *De Tastet*, 8 Taunt. 712, under the old law, an objection was taken to a bond, on the ground that it was not a bond of indemnity, but a bond for securing a "definite and certain sum of money," and, therefore, liable to an *ad valorem* stamp. The circumstances were these: A verdict had been found for the plaintiff in the cause for the sum of 37,000*l*. A new trial was afterwards moved for, and the motion was acceded to on condition that the defendant should procure a bond from a third person, to secure to the plaintiff the sum to be recovered by the action, and costs, in case a similar verdict should be given on the second trial. The Court held the stamp to be sufficient. *Dallas*, C. J., said, "This cannot be considered as a bond for a sum certain, neither is it a bond for securing money to be lent, advanced, or paid, nor does it come within the clause as to bonds for the performance of covenants for payment of money. It is a mere indemnity bond, and is properly stamped." An agreement by A., B. and C., severally and respectively to indemnify E. from a liability to 200*l*., to the extent of 50*l*. from each, to be paid severally, with a fourth part of the costs, and severally to execute certain bonds, &c., is an entire transaction, and requires only one stamp: *Ramsbottom* v. *Davis*, 7 Dowl. P. C. 173.

PRECEDENTS.

I. *BOND given by the* PURCHASER *of* LEASEHOLD PREMISES, *to the* VENDOR (*the* LESSEE), INDEMNIFYING *him from* RENT *and* COVENANTS *in the Lease.*

Obligation. KNOW ALL MEN BY THESE PRESENTS, that I [*obligor*], of &c., am bound to [*obligee*], of &c., in the sum of £———, to be paid to the said [*obligee*], his executors, administrators, or assigns, or to his or their attorney or attorneys; For which payment I bind myself by these presents; Sealed with my seal: Dated the ——— day of ———, 18—.

Recitals: of lease; WHEREAS, by an indenture of lease, dated the ——— day of ———, and made between [*lessor*], of the one part, and the above-named [*obligee*], of the other part, the said [*lessor*] demised unto the said [*obligee*], All that messuage or dwelling-house, being No. ——— in ——— Street, in the city of ———, with the appurtenances, for the term of ——— years thence next ensuing, at the yearly rent of £———, payable quarterly, and subject to certain covenants on the part of the said [*obligee*], his heirs, executors, administrators, and assigns, to be observed and performed: AND

of contract for purchase; WHEREAS the above-bounden [*obligor*] has contracted with the said [*obligee*] for the purchase of the messuage and premises comprised in the said indenture of lease, for all the

of assignment of even date; residue of the term thereby granted; And by an indenture of assignment, bearing even date with the above-written obligation, made between the said [*obligee*], of the one part, and the said [*obligor*], of the other part, the same premises have been [*or* are intended to be], assigned unto and vested in the said [*obligor*], his executors, administrators, and assigns, for all the residue now to come and unexpired of the said term of ——— years, at the rent and subject to the covenants reserved by and contained in the said indenture

I. Bond by an Assignee of Leaseholds to Indemnify Lessee from Rent, &c.

of lease, and on the lessee's part to be paid and performed: AND WHEREAS, upon the treaty for the said purchase, it was agreed between the said parties, that the said [*obligor*] should give unto the said [*obligee*] a bond or obligation, with a condition to be thereunder written, to the effect hereinafter contained. NOW THE CONDITION of the above-written obligation is such, that if the above-bounden [*obligor*], his heirs, executors, administrators or assigns, shall from time to time hereafter pay the said rent of £———, and observe and perform the several covenants, conditions, and agreements, reserved by and contained in the said indenture of lease, and on the part of the [*lessee*], his heirs, executors, administrators or assigns, to be paid, observed, and performed; And also if the said [*obligor*], his heirs, executors, administrators or assigns, shall from time to time, and at all times hereafter, effectually keep indemnified the said [*obligee*], his heirs, executors and administrators, from all actions and other proceedings which shall be commenced or prosecuted against the said [*obligee*], his heirs, executors or administrators, and all costs, losses, damages and expenses which he or they or any of them shall respectively incur or suffer, by reason of the non-observance or non-performance of the said covenants, conditions, and agreements, or any of them, or the non-payment of the said rent, or by reason of any matter or thing in relation thereto, THEN the above-written bond shall be void, or otherwise shall remain in full force.

of agreement for indemnity.

Condition.

II. *BOND of* INDEMNITY *to the Executor of an Obligor of a* LOST BOND, *on* PAYMENT *of* MONEY *secured thereby.*

KNOW ALL MEN, &c., *ut ante*, p. 944.

Recites the bond which is lost.

WHEREAS, by a bond or obligation dated the ——— day of ———, under the hand and seal of [*obligee's testator*], of &c., the said [*obligee's testator*] became bound unto the said [*obligor*], in the penal sum of £———, with a condition for making the same void, upon payment by the said [*obligee's testator*], his executors or administrators, unto the said [*obligor*], his exe-

II. Bond of Indemnity on Payment of a Lost Bond.

cutors, administrators, or assigns, of the sum of £———, with interest, after the rate of five pounds per centum per annum, on the day therein mentioned: And whereas the said [*obligee's testator*] died on the ——— day of ———, having duly made his will, dated the ——— day of ———, and thereof appointed the said [*obligee*] sole executor, who has duly proved the same in the Principal Registry of the High Court of Justice, Probate Division: And whereas the said principal sum of £——— is still due and owing upon the said bond or obligation, and the said [*obligor*] having called upon the said [*obligee*], as the executor of the said [*obligee's testator*], for the payment of the said sum of £———, he the said [*obligee*] has agreed to pay the same accordingly, in full satisfaction of all principal and interest moneys due and owing upon or by virtue of the said recited bond; but the same bond having been lost or mislaid, the said [*obligor*] has consented, upon such payment being so made to him as aforesaid, to enter into a bond, conditioned for the indemnity of the said [*obligee*] as hereinafter mentioned: And whereas, in pursuance of the said agreement, the said [*obligee*] has this day paid to the said [*obligor*] the said sum of £———, as he the said [*obligor*] hereby acknowledges. NOW THE CONDITION of the above-written bond or obligation is such, that if the said [*obligor*], his heirs, executors, or administrators, shall, when and so soon as the said bond of the said ——— day of ———, shall be found, deliver or cause to be delivered the same unto the said [*obligee*], his executors or administrators, or the executors or administrators of the said [*obligee's testator*], deceased, for the purpose of being cancelled; And also if the said [*obligor*], his heirs, executors, or administrators, shall, from time to time, and at all times hereafter, until the said bond shall be so delivered up to be cancelled as aforesaid, keep indemnified the said [*obligee*], his heirs, executors, and administrators, and the heirs, executors, and administrators of the said [*obligee's testator*], deceased, and the lands and tenements, goods and chattels, of them and every of them, from and against the said bond, and all principal and interest moneys thereby secured as aforesaid, and from and against all actions, costs, charges, damages, and expenses, which he or they shall or may pay, bear, suffer, sustain, and be put unto, for or by reason or on account of the said bond, or the

Death of obligor and representation to him.

That principal secured by bond is still due, and agreement to pay it on execution of bond of indemnity.

That moneys secured by bond have been paid.

Condition to be void on giving up bond if found, and indemnifying executor of obligor in the meantime.

principal and interest moneys thereby secured, or any act, matter, or thing relating thereto; Then, the above-written bond (*b*), &c. II. Bond of Indemnity on Payment of a Lost Bond.

III. *BOND of* INDEMNITY, *from a* VENDOR *to a* PURCHASER, *against the* LOSS *of* TITLE DEEDS.

FORM *of Obligation, ut ante*, p. 944.

WHEREAS (*recital of conveyance by obligor to obligee of certain freeholds*): AND WHEREAS the title deeds and writings belonging or relating to the said freehold messuages and hereditaments are lost or mislaid, and the said [*obligor*], upon the treaty for the sale of the same premises, agreed to give unto the said [*obligee*] in respect of the same deeds, the security or indemnity of the bond of the said [*obligor*], with such condition as is hereinafter expressed. NOW, THEREFORE, THE CONDITION of the above-written bond or obligation is such, that, if at any time or times the several title deeds and writings belonging or relating to the title of the said premises, and specified in the schedule hereunder written, shall be found, and the said [*obligor*], her heirs, executors, or administrators, shall deliver or cause to be delivered the same title deeds and writings unto the said [*obligee*], his heirs or assigns, safe, whole, and uncancelled; or if such original deeds and writings, or any of them, being so found, shall appear to be in the custody of some person or persons entitled to them in respect of other property, then true and attested copies of such deeds and writings, together with the covenant or statutory acknowledgment and undertaking of the same person or persons, for the production and safe custody of the same deeds and writings; all such copies, covenants, acknowledgments, and undertakings, as aforesaid being respectively made and entered into at the expense of the said [*obligor*], her heirs, executors, or administrators; And also, if the said [*obligor*], her heirs, executors, and admi-

Recital of loss of deeds, and agreement for indemnity.

Condition.

(*b*) The Court will entertain an action by the obligee of a lost bond, to enforce payment, on an indemnity being given: *East India Co.* v. *Boddam*, 9 Ves. 464. See *Macartney* v. *Graham*, 2 Russ. & M. 253; *Stokoe* v. *Robson*, 6 Mad. 41, n.; *Shelmardine* v. *Harrop*, 6 Mad. 39; *Ex parte Wallis, Re Hambly*, 1 Dea. 496.

III. Bond of Indemnity against Loss of Title Deeds.

nistrators, shall, in the meantime and until such deeds and writings shall be found, and also in case the same shall appear to be finally lost, keep indemnified the said [*obligee*], his heirs, executors, administrators, and assigns, and all his and their estates and effects whatsoever, from and against all claims and demands, evictions, molestations, hindrance, or disturbance whatsoever, by or from any person or persons claiming adversely to the title late of the said [*obligor*], and by her meant to be conveyed to the said [*obligee*], in the said freehold hereditaments as aforesaid, for or by reason or means of the want or non-production of the same title deeds, evidences, and writings, or any of them, Then, and in such respective case as aforesaid, the before-written bond or obligation shall be void, but otherwise shall remain in full force.

THE SCHEDULE ABOVE REFERRED TO.

IV. *BOND to* INDEMNIFY MORTGAGEES *against Claim of* DOWER. PROVISO *in case of such Claim enabling them to* CALL IN *the* MORTGAGE MONEY.

Bond.

KNOW ALL MEN BY THESE PRESENTS, that we [*obligor*], of &c., and [*obligor*], of &c., are bound to [*obligee*], of &c., and [*obligee*], of &c., in the sum of £——— to be paid to the said [*obligees*], or to their executors, administrators or assigns, or to their attorney or attorneys; For which payment we bind ourselves and each of us jointly, severally and respectively by these presents; Sealed with our seals: Dated this ——— day of ———, 18—.

Recital of mortgage;

WHEREAS by an indenture of mortgage bearing even date with the above-written bond, and made between the above-named [*obligors*], of the one part, and the above-named [*obligees*], of the other part, the hereditaments comprised in the schedule to the said indenture, situate, &c., have been conveyed unto and to the use of the said [*obligees*], their heirs and assigns for ever, subject to a proviso therein contained for the redemption of the same premises on payment

containing proviso for continuance for a term of years.

to the said [*obligees*] of the principal sum of £———, with interest for the same in the meantime, on the ——— day of ———, 18—, but in the said indenture is contained a pro-

IV. Bond of Indemnity against Claim of Dower.

viso that if said ———, his heirs, executors or administrators shall pay interest for the said principal sum half-yearly, on the days and in manner therein mentioned, the said [*obligees*], or their executors, administrators or assigns, shall not call in or compel payment of the said principal sum or any part thereof before the ——— day of, &c.: AND WHEREAS it was agreed upon the treaty for the said loan that an indemnity should be given by the said [*obligors*] against any claim on the part of [*widow*], the widow of [A. B.], late of &c., deceased, or her executors, administrators or assigns, in respect of dower or thirds out of the said hereditaments, and the above-written bond has been executed by them for that purpose: And it was further agreed that if any such claim should be made, the said principal sum or any part thereof should be recoverable before the said ——— day of ———, 18—. NOW THE CONDITION of the above-written bond is such that if the said [*obligors*], or either of them, or their or either of their executors or administrators shall at all times hereafter protect and keep indemnified the said [*obligees*], and each of them, and their and each of their heirs, executors, administrators and assigns, and also the said hereditaments specified in the schedule to the hereinbefore recited indenture and every part thereof from and against all actions, claims and demands whatsoever on the part of the said [*widow*], her executors, administrators or assigns, in respect of dower or thirds out of the same hereditaments or any part thereof, then the above-written bond shall be void, otherwise it shall be and remain in full force. AND IT IS HEREBY AGREED and declared, that if at any time during the continuance of the aforesaid mortgage any such action, claim or demand as aforesaid shall be brought, commenced, or made against or upon the said [*obligees*], or either of them, or their or any of their heirs, executors, administrators or assigns, or against or upon the said hereditaments specified in the schedule to the hereinbefore recited indenture or any part thereof, Then and in every such case it shall be lawful for the said [*obligees*], or the survivor of them, or the executors or administrators of such survivor, or their or his assigns, to call in and compel payment of the said principal sum of £——— or any part thereof at any time or times before the said ——— day of ———, 18—, the hereinbefore recited proviso to the contrary notwithstanding.

Agreement for indemnity against dower,

and for recovering mortgage money in case of any claim.

Condition for indemnity by obligors.

Proviso that mortgagees may call in money if a claim is made.

V. *RELEASE and* INDEMNITY *by some of the Persons beneficially interested under a Will, to the* TRUSTEES CARRYING ON *the* TESTATOR'S TRADE *without Authority.*

THIS INDENTURE, made the ——— day of ———,

Parties. BETWEEN [A. B.], of &c., and [E.] his wife, and [J. B.],

Recitals: of will; of &c., of the one part, and [P. B.], [S. B.] and [J. L.] [*the trustees*], of &c., of the other part: WHEREAS [*testator*], by his will, gave, devised, and bequeathed all his real and personal estate unto and to the use of the said [P. B.], and [S. B.], and [M. N.], their heirs, executors, administrators, and assigns, upon trust to convert the same into money, and, after payment of his debts and legacies, to pay one equal fifth part of the residue of the produce of his said estate unto his sister, the said [E. B.], for her separate use, one other fifth part unto his brother [G. B.], the like unto his brother, the said [J. B.], the like unto the said [P. B., *one of the trustees*], and the like unto his niece [S. M.] if she should attain her majority, but if she should die under age, then equally among such of the said [E. B.], [G. B.], [J. B.], and [P. B.], as should then be living, the share of the said [E. B.], to be for her separate use: AND WHEREAS the said [M. N.] died in the lifetime of the said testator:

of probate; AND WHEREAS the said [*testator*] died on the ——— day of ———, 18—; the said will was proved in the district registry at ——— of the Probate Division, on the ——— day of ———, by the said [P. B.] and [S. B.], the surviving

of appointment of new trustee; executors therein named: AND WHEREAS by ~~an~~ indenture dated, &c., and made, &c., the said [J. L.] was duly appointed to be a trustee under the said will, in the room of the said [M. N.], deceased as aforesaid: AND WHEREAS

that trustees have carried on testator's trade; the trade of a ———, carried on by the said [*testator*] until his death, has been carried on by the said [P. B.] and [S. B.], and is intended to be carried on by the said trustees until the same can be advantageously sold; but it is apprehended that the said will does not authorize the said trustees to carry on the said trade, or in other respects to act to the best advantage in disposing of the said

of incapacity of two of the *cestuis que trustent.* trust property: AND WHEREAS the said [S. M.] is of the age of sixteen years, and the said [G. B.] is not of sound mind. NOW THIS INDENTURE WITNESSETH,

Testatum. that in consideration of the premises, each of them the said

V. Release and Indemnity to Trustees carrying on Testator's Trade.

[A. B.], and [E.] his wife, [J. B.], and [P. B.], declares that it shall be lawful for, but not incumbent on, the said [*trustees*], and other the trustees or trustee for the time being under the said will, to carry on the said trade and do all usual acts for that purpose until they or he shall receive from the said [E. B.] and [J. B.], or either of them, or the executors, administrators, or assigns of either of them, or of the said [P. B.], notice in writing to discontinue the same: AND to do such acts in carrying on the said business or in relation thereto, and to sell, demise, and deal with the said real and personal estate of the said [*testator*], or any part thereof, at such time or times, and upon such terms, on credit or otherwise, as shall from time to time be authorized in writing by the said [A. B.], and [E.] his wife, [J. B.], and [P. B.], or any one or more of them: PROVIDED that the authority hereinbefore given, and the release and covenant or agreement (*c*) for indemnity against the consequences of any acts done in pursuance of such authority hereinafter contained, shall not have any operation against, or be binding upon, any of the said parties hereto, or his or her property or interest, except so far as he or she individually may have given such authority. AND the said [A. B.], and [E.] his wife, and [J. B.] hereby release unto the said [*trustees*], and each of them and their respective heirs, executors, and administrators all present and future actions, claims, and demands against them, or any of them, on account of the said trade having been so carried on as aforesaid, or of any involuntary loss which has been or may be sustained in the said trade, or by reason of anything to be done in pursuance of such authority as aforesaid. AND the said [A. B.], and [E.] his wife, and [J. B.] jointly and severally covenant and agree with the said [*trustees*] jointly and severally, And the said [P. B.] covenants with the said [S. B.] and [J. L.] jointly and severally, That the said covenanting parties respectively and their respective heirs, executors, and administrators will at all times indemnify the said [*trustees*] respectively, and their respective heirs, executors, administrators and assigns, against all losses and liabilities consequential on such trading as aforesaid, or on any acts to be done in pursuance of these

Authority to trustees to carry on trade;

to do such acts as competent *cestuis que trust* shall authorize.

Each *cestui que trust* to be bound by such acts only as he shall authorize.

Release by *cestuis que trustent*.

Covenant of indemnity.

(*c*) A married woman may contract so as to bind her separate estate; see Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), sect. 1, sub-sects. 2, 3 and 4.

V. Release and Indemnity to Trustees carrying on Testator's Trade.

presents, or of such authority as aforesaid: And that the said trustees or trustee for the time being may retain or allow, and pay to their or his co-trustee or co-trustees, or to the representatives of any deceased trustee, out of the respective shares of the said covenanting parties in the said trust property, compensation for all such losses as they or he may sustain as aforesaid, and that such compensation shall be a specific charge on such shares, in priority to all other charges. In witness, &c.

Trustees to be indemnified out of the shares of the covenanting parties.

VI. *DEED OF COVENANT to* INDEMNIFY *a Tenant paying Rent, where the Title to the Reversion is in dispute, against any Distress, Entry, or Claim in respect of the Rent.*

Parties.

THIS INDENTURE, made on the ——— day of ———, Between [*landlord*], of &c., of the one part, and [*tenant*], of &c., of the other part:

Recitals: of lease:

Whereas, by an indenture of lease dated the ——— day of ———, and made between the said [*landlord*], of the one part, and the said [*tenant*], of the other part: All those [*parcels*] were demised unto the said [*tenant*] for the term of ——— years from the ——— day of ———, 18—, at the annual rent of £———, and subject to the covenants and conditions therein contained:

of dispute as to title.

And whereas an action is now pending between the said [*landlord*] and certain other persons as to the right or title of the said [*landlord*] to the reversion of the said messuage and premises comprised in the said indenture of lease, but the said [*tenant*] has agreed to pay the rent for the same, as and when it shall accrue due, to the said [*landlord*], upon receiving from the said [*landlord*] an indemnity in manner hereinafter appearing.

Covenant to indemnify tenant from distress, &c.

NOW the said [*landlord*] covenants with the said [*tenant*] that the said [*landlord*], his executors, administrators, or assigns, will henceforth indemnify the said [*tenant*], his heirs and assigns, and other the occupiers of the premises comprised in the said indenture of lease, or of any part thereof, against all distresses, entries, claims, demands, actions, and other proceedings for the recovery of or in relation to the said rent, or any part thereof, and also against all losses, costs, charges, damages, or expenses which he or they may pay or sustain, on account or in respect of payment of the said rent, or any part thereof, to the said [*landlord*], his heirs or assigns, or otherwise in relation to the premises. In witness, &c.

VII. *DEED OF COVENANT and* Declaration *of* Trust *of a* Sum *of* Stock *invested in the Names of* Trustees, *to* indemnify *a* Purchaser *of* Lands *against a* Life Annuity *charged thereon.*

THIS INDENTURE, made the ——— day of ———, 18—, Between [*vendor*], of &c., of the first part; [*purchaser*], of &c., of the second part; and [*trustee*], of &c., and [*trustee*], of &c., of the third part: Whereas under or by virtue of the will of [*testator*], late of &c., deceased, the said [*vendor*], became seised of certain messuages, lands and hereditaments, situate at ———, in the county of ———, for an estate of fee simple in possession, free from incumbrances, except an annuity of 200*l.*, payable to [*annuitant*], of &c., during her life, by equal quarterly payments on the usual quarter days, and charged on the said premises by the said will: And whereas the said [*vendor*] lately contracted with the said [*purchaser*] for the sale to him of the said premises devised by the said will, and by an indenture, bearing even date herewith, and expressed to be made between the said [*vendor*], of the one part, and the said [*purchaser*], of the other part, the same premises were, for the consideration therein mentioned, conveyed to the [*purchaser*] in fee simple: And whereas, upon the treaty for the said purchase, it was agreed that the sum of £——— should be invested by the said [*vendor*] in the names of trustees, to be held by them upon the trusts hereinafter contained of and concerning the same by way of an indemnity to the said [*purchaser*] against the said annuity: And whereas, in pursuance of the said agreement, the said [*vendor*] has invested the sum of £——— in the purchase, in the names of the said [*trustees*], of the sum of £——— Consolidated £3 per Cent. Annuities. NOW THIS INDENTURE WITNESSETH, that in further pursuance of the said agreement, and in consideration of the premises, the said [*vendor*] covenants with the said [*purchaser*], that the said [*vendor*], his executors, administrators or assigns, will henceforth pay the said annuity of £———, as and when the same shall become payable as aforesaid, and will indemnify and keep indemnified the said [*purchaser*], his heirs and assigns, and other the owners and occupiers of the said premises comprised in the hereinbefore recited indenture of even date

Parties.

Recitals:

of vendor's seisin subject to annuity;

of sale and conveyance to purchaser;

of agreement for indemnity;

of purchase of stock.

Testatum.

Covenant by vendor to pay annuity and indemnify purchaser therefrom.

VII. Indemnity by Declaration of Trust of Stock.

herewith, and every part thereof, against all distresses, entries, claims, demands, actions and other proceedings, for the recovery of, or in relation to the said annuity, or any part thereof. AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance of the said agreement, and for the consideration aforesaid, it is hereby agreed and declared that the said [*trustees*] shall stand possessed of the said sum of £——— Consolidated £3 per Cent. Annuities (hereinafter called the trust funds), upon the trusts following, that is to say: UPON TRUST, that the said [*trustees*], or the survivor of them, or the executors or administrators of such survivor, or their or his assigns (who are hereinafter collectively referred to as the trustees), shall either permit the trust funds to remain in their present state of investment, or shall, at their discretion, sell and dispose of the same and invest the proceeds of such sale in the names of the trustees in the purchase of any parliamentary stocks or funds of the United Kingdom, but not in any other investment, And shall stand possessed of the said trust funds and the investments thereof, and the dividends and annual income thereof, upon the trusts following, that is to say; Upon trust out of the dividends and annual income of the trust funds, or out of the proceeds of the sale of a competent part of the trust funds, to pay all such sums as shall be necessary from time to time for the purpose of paying and keeping down the said annuity, as and when the same shall become payable as aforesaid, in case the said [*vendor*] shall neglect or fail so to do by the space of ——— days after any quarterly payment of the same shall become due, and for the purpose of indemnifying and keeping indemnified the said [*purchaser*], his heirs and assigns, and the owners and occupiers for the time being of the said premises comprised in the said indenture of even date herewith, and every part thereof, against all distresses, entries, claims, demands, actions and other proceedings for the recovery of or in relation to the said annuity or any part thereof: PROVIDED ALWAYS, that it shall be lawful for the trustees, for the purposes aforesaid, or any of them, to sell and convert into money the said trust funds, or any part thereof, as and when occasion may require: AND IT IS HEREBY AGREED and declared that, subject to the trusts aforesaid, the trustees shall stand possessed of the trust funds and the investments thereof, and the dividends and annual

Further *testatum*.

Declaration of trusts of stock.

On default of vendor to pay annuity.

Power for trustees to realize.

Ultimate trusts for benefit of vendors.

income thereof, or so much thereof respectively as shall not actually have been required and applied under the trusts and provisions hereinbefore contained: UPON TRUST, during the life of the said [*annuitant*], to pay the dividends and income of the trust funds, as and when the same shall be received, to the said [*vendor*], his executors, administrators or assigns; AND from and after the decease of the said [*annuitant*], UPON TRUST for the said [*vendor*] absolutely: PROVIDED ALWAYS, and it is hereby agreed and declared, that the power of appointing a new trustee of these presents in the place of the said [*first trustee*], or of any trustee to be hereafter appointed in his place, shall be exerciseable by the said [*vendor*], his executors, administrators or assigns, and the power of appointing a new trustee in the place of the said [*second trustee*], or of any trustee to be hereafter appointed in his place, shall be exerciseable by the said [*purchaser*], his executors, administrators or assigns: PROVIDED LASTLY, that nothing herein contained shall operate to prejudice or affect the covenants for title by the said [*vendor*], contained or implied in the said indenture of even date herewith, or any liability of the said [*vendor*], under or by virtue of the same. IN WITNESS, &c.

VII. **Indemnity by Declaration of Trust of Stock.**

Power of appointing new trustees.

Indemnity not to affect covenants for title.

VIII. *DEED OF APPORTIONMENT of* RENT *between the* PURCHASERS *of two Lots held under one* LEASE, *with mutual* POWERS *of* DISTRESS *by way of* INDEMNITY.

THIS INDENTURE, made &c., BETWEEN [A. B.], of &c., of the one part, and [C. D.], of &c., of the other part: WHEREAS, by indenture of lease, dated &c. (*recital of a lease of a piece of ground, and two messuages thereon, to* [lessee] *for ninety-nine years, at the rent of* 14*l.* 18*s.*, *and an additional rent of* 50*l. in case certain trades were carried on therein*): AND WHEREAS the said [*lessee*] on or about the ——— day of ———, caused the messuages, tenements, and premises comprised in the said indenture of lease to be put up to sale by auction, in two lots, pursuant to printed particulars and conditions published previously to such sale, at which the said [A. B.] and [C. D.] were declared the purchasers of the

Parties.

Recitals:

of sale by auction;

VIII. Apportionment of Rent of Lease among Assignees, with Mutual Powers of Distress.

of assignments to present purchasers;

messuages or tenements and premises comprised in the said indenture of lease, that is to say; the said [A. B.] of one of the said messuages, with the appurtenances, being No. 2 in ———, at or for the price or sum of ——— pounds; and the said [C. D.] of the other of the said messuages, with the appurtenances, being No. 3, in ——— aforesaid, at or for the price or sum of £———: And whereas, by indenture of assignment bearing even date with, but executed previously to the execution of these presents, and made between the said [*lessee*], of the first part; the said [A. B.], of the second part; and the said [C. D.], of the third part, in consideration of the sum of £———, to the said [*lessee*] paid by the said [A. B.], he the said [*lessee*] assigned unto the said [A. B.], his executors, administrators, and assigns, All that, &c. (*describe parcels*), To hold the same unto the said [A. B.], his executors, administrators, and assigns, from the ——— day of ——— then last past, for all the unexpired residue of the term of ninety-nine years, by the said indenture of lease granted, subject, nevertheless, to the payment of the yearly rent of 7*l.* 9*s.*, being one moiety or half part of the yearly rent or sum of 14*l.* 18*s.* by the said indenture of lease reserved, and subject also to the performance of the covenants, conditions, and agreements, in the same indenture of lease contained, so far only as the same relate to the messuage or tenement and premises thereby assigned: And whereas, by another indenture of assignment, also bearing even date, &c. (*recital of assignment of the other house to* C. D. *in same form*): And whereas, by the conditions of the said sale, it was stipulated that each of them the said [A. B.] and [C. D.], the purchasers of the said messuages or tenements and premises, should pay the yearly rent of 7*l.* 9*s.* in respect of the premises by him purchased, being one moiety of the said yearly rent of 14*l.* 18*s.* reserved by the said indenture of lease: And whereas, for the more effectually apportioning the said yearly rent or sum of 14*l.* 18*s.* between them the said [A. B.] and [C. D.], and their executors, administrators, and assigns, and for indemnifying each of them, and his executors, administrators, and assigns, and the premises by him purchased, from the rents, covenants, and agreements reserved by and contained in the said indenture of lease, which ought to be paid, observed, and performed in respect of the premises purchased by the other of them, it has been agreed between

of agreement for apportionment of rent and indemnity.

the said [A. B.] and [C. D.] that they shall respectively enter into such covenants as are hereinafter contained. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the premises, and of the covenants on the part of the said [C. D.], hereinafter contained, the said [A. B.] hereby covenants with the said [C. D.], in manner following, that is to say; that he the said [A. B.], his heirs, executors, administrators, and assigns, will, from time to time and at all times hereafter, during the unexpired residue of the said term, pay unto the said [C. D.], his executors, administrators, or assigns, or unto such person or persons as shall from time to time be entitled to receive the ground rent or sum of 14*l.* 18*s.* reserved by the said indenture of lease, the clear yearly rent or sum of 7*l.* 9*s.* being one moiety or half part of the said ground rent or sum of 14*l.* 18*s.*, when and as the same shall become due and payable; and will pay, or cause to be paid, the said increased rent of 50*l.*, in case the same shall become payable by reason of any act or default of the said [A. B.], his executors, administrators, under-tenants, or assigns: And will, during the continuance of the said term, observe and perform the covenants and stipulations contained in the said indenture of lease, and on the part of the said [A. B.], his executors, administrators, and assigns, to be observed and performed, so far as such covenants and stipulations relate to the messuage or tenement and premises so purchased by him the said [A. B.], and comprised in the firstly-recited indenture of assignment bearing even date herewith; and will, at all times hereafter, effectually keep indemnified the said [C. D.], his executors, administrators, and assigns, from and against all losses, costs, charges, damages, and expenses which he or they shall or may at any time or times hereafter pay or sustain for or on account or in respect of any and every neglect, breach, or default which shall or may at any time or times hereafter happen in the payment of the said moiety or half part of the said yearly rent or sum of 14*l.* 18*s.*, or of the said increased rent, or in the performance of the said covenants, stipulations, and agreements, so far as the same ought to be paid and performed by the said [A. B.], his executors, administrators, or assigns: AND MOREOVER, that in case the said [C. D.], his executors, administrators, or assigns, shall at any time or times hereafter pay or sustain any sum or sums of money,

VIII. **Apportionment of Rent of Lease among Assignees, with Mutual Powers of Distress.**

Testatum.

Covenant to pay moiety of rent.

Covenant by [A. B.] to pay increased rent if same shall become payable through his means;

and perform covenants as far as respects his part of the premises;

and to indemnify the other purchasers therefrom.

Power to distrain on breach of covenants.

VIII. Apportionment of Rent of Lease among Assignees, with Mutual Powers of Distress.

costs, charges, damages, or expenses, for or on account or in respect of the said yearly rent or sum of 7*l.* 9*s.*, or of the increased rent, covenants, and agreements hereinbefore covenanted and agreed to be paid, observed, and performed by the said [A. B.], his executors, administrators, and assigns, as aforesaid, or any of them, then, and in every such case, it shall be lawful for the said [C. D.], his executors, administrators, or assigns, into and upon the messuage, tenement, and premises so purchased by the said [A. B.], and comprised in the firstly-recited indenture of assignment, bearing even date herewith, to enter and distrain for all and every such sum and sums of money, costs, charges, damages, and expenses which he the said [C. D.], his executors, administrators, or assigns, shall so pay or sustain, and the distress or distresses then and there found to take, impound, and keep, until the same sum and sums of money, costs, charges, damages, and expenses, and all costs, charges, and expenses whatsoever, sustained or occasioned by or attending the making, taking, and keeping any such distress or distresses, shall be fully paid and satisfied; and in default of payment thereof, in due time after such distress or distresses shall be made and taken as aforesaid, to dispose of such distress or distresses, or any part thereof, or otherwise to act in regard thereto, according to the due course of law, in like manner as in case of distress for non-payment of rent reserved on common leases, to the intent that thereby and therewith the said [C. D.], his executors, administrators, and assigns, shall and may be fully paid and satisfied all and every such sum and sums of money, costs, charges, damages, and expenses as aforesaid.

Second *testatum*.

AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the said agreement, and in consideration of the covenants hereinbefore contained on the part of the said [A. B.], his heirs, executors, and administrators, he the said [C. D.] hereby covenants with the said [A. B.] in manner following, that is to say (*the same covenants and power of distress*, mutatis mutandis, *as before*). IN WITNESS, &c.

IX. *DEED OF COVENANT by one* PURCHASER *with other Purchasers, and with the Vendors,* CHARGING, *exclusively, Lands sold to him with certain* ANNUAL OUTGOINGS *payable out of the whole, and giving a* POWER *of* DISTRESS *by way of Indemnity.*

THIS INDENTURE, made the ——— day of ———, 18—, BETWEEN [*covenantor*], of &c., of the first part; [*purchasers of certain parts of the premises intended to be exonerated*], of &c., of the second part; [*vendors, being owners of other parts*], of &c., of the third part: WHEREAS divers freehold estates, situate in the parishes of ———, in the county of ———, late the property of [A. B.], Esquire, deceased, to which the said [*vendors*] became entitled in fee simple, under the will of the said [*testator*], were some time since offered for sale by public auction in ——— lots (*a*); and the said [*covenantor*] thereupon contracted for the purchase of lots 2, 3, and 30, consisting of the lands and hereditaments specified and set forth in Schedule A. hereunto annexed; AND the said several persons, parties hereto of the second part, also contracted for the purchase of the rest of the said lots (except lots 8 and 27), which lots, so contracted to be purchased by the said parties of the second part, consist of the lands and hereditaments specified and set forth in Schedule B. hereunto annexed: AND WHEREAS the said lots 8 and 27, being the residue of the said estates, and consisting of the lands and hereditaments specified and set forth in Schedule C., hereunto annexed, remain in the hands of the said [*vendors*] unsold: AND WHEREAS it was stipulated by the conditions of the said sale that lot 2 was to be sold subject to an annual payment of 32*l.* to the rector of [D.], and to the repair of the chancel of [D.] church; AND that lot 3 was subject to the following annual outgoings, namely, a rent of 3*l.* 9*s.* 6*d.*, formerly payable to the Crown, but now

Parties.

Recital of sale of certain hereditaments in divers lots.

Certain lots sold subject to the charges;

(*a*) In this case, a reference to the lots into which the property was distributed at the sale by auction seems to be almost unavoidable, in order to explain the transaction and more conveniently to distinguish the several purchases; but, in general, references of this nature, which introduce the temporary arrangements of the sale into the recitals of deed relating to land, are not desirable. Recitals.

IX. Grant of Power of Distress by way of Indemnity.

payable to [T. L.], Esquire, and 10*l.* for the salary of the master of [D.] school: And that the purchaser or purchasers of the said lots 2 and 3 should execute a deed or deeds, covenanting that the aforesaid annual payment of 32*l.*, and the expense of repairing the chancel of [D.] church, should for ever be charged exclusively on the said lot 2; And that the said other annual outgoings, amounting together to the sum of 13*l.* 9*s.* 6*d.*, should for ever be charged exclusively on the said lot 3; And that power should be given to the purchasers of the other lots, their heirs and assigns, to enter and distrain on the said lots 2 and 3, as an indemnity against such outgoings: And whereas, by the several indentures specified in the said Schedules A. and B., the several lots so contracted to be purchased by the said several parties hereto of the first and second parts, as aforesaid, have been, or are intended to be, conveyed unto, or in trust for the same parties respectively, their respective heirs and assigns, in manner therein expressed. NOW THIS INDENTURE WITNESSETH, that, for carrying into effect the stipulation so entered into as aforesaid in this behalf, and in consideration of the premises, the said [*covenantor*] hereby covenants with the said several other persons, parties hereto of the second and third parts respectively, in manner following (that is to say); that the said annual payment of 32*l.* to the rector of [D.], and the expense of repairing the chancel of [D.] church, shall for ever be charged exclusively on the hereditaments comprised in lot 2 aforesaid; and that the said other annual outgoings shall for ever be exclusively charged on the hereditaments comprised in lot 3 aforesaid: And further (*b*), that if, at any time or times hereafter, any distress, entry, claim, or demand shall be made or levied in or upon any part or parts of the lands and hereditaments comprised in the Schedules B. and C., hereinbefore referred to, for recovering payment of the said annual sum of 32*l.*, or of any money for such repair as aforesaid, or for recovering payment of the said other annual outgoings, or of any part thereof respectively, or if any money or costs shall be recovered against any of the owners or occupiers of the hereditaments comprised in the said

and to a stipulation for the indemnity of the other purchasers.

Reference to the conveyances to the several purchasers.

Testatum.

Covenant,

that the outgoings shall be charged only upon the covenantor's lots.

Power of distress by way of indemnity.

(*b*) As to the validity of these indemnifying powers of distress, and that they enure for the benefit of the owner for the time being of the land to be exonerated, *vide ante*, p. 939 (*n*).

IX. Grant of Power of Distress by way of Indemnity.

Schedules B. and C., on account of the said annual rent of 32*l.*, or repairs, or any other of the said outgoings, then and in every such case it shall be lawful for the person or persons for the time being entitled in possession to the hereditaments, wherein or whereupon any such distress, entry, claim, or demand shall be so made or levied as aforesaid, or for such owners or occupiers as aforesaid, against whom such money or costs shall be recovered as aforesaid, to enter and distrain upon the hereditaments intended to be hereby exclusively charged with the annual outgoing or annual outgoings in respect of which such distress or distresses shall have been so made or levied as aforesaid, or such money or costs as shall have been recovered as aforesaid; And the distress or distresses then and there made to take, impound, and dispose of, or otherwise to act therein according to law, in the same manner as in the case of distresses by landlords for rent reserved upon leases for years; To the intent, that, by the means aforesaid, the person or persons so for the time being entitled as aforesaid, or against whom any such money or costs shall be recovered as aforesaid, may be fully paid and satisfied all and singular the sum and sums of money, costs, charges, damages, and expenses, which he, she, or they shall or may have sustained or incurred, by reason or in consequence of any such distress, entry, claim, or demand, or any action or actions, or suit or suits, or other proceeding for recovering payment of any of the said annual outgoings as aforesaid, or otherwise in relation thereto; And also the costs, charges, and expenses incident to or attending the distress or distresses to be made or levied in pursuance of the power hereinbefore contained, or in relation thereto. In witness, &c.

THE SCHEDULES TO WHICH THE PRECEDING INDENTURE REFERS.

Schedule A.

No. of Lot.	Name of Close.	Contents.	Parish where situate.	Occupying Tenant.	Particulars of Conveyances.

(*Other Schedules in the same manner.*)

X. *INDEMNITY against a* RENT-CHARGE, *by a* GRANT *of a* POWER *of* DISTRESS *on* OTHER *Lands.*

Parties.

THIS INDENTURE, &c., BETWEEN [*grantor*], of &c., of the one part, and [*grantee*], of &c., of the other part:

Recitals: of agreement for sale;

WHEREAS the said [*grantor*], being seised in fee simple in possession of a certain messuage, farm, lands, and hereditaments, called ———, subject to and charged with the payment of a yearly rent-charge of £———, created by an indenture dated, &c., has lately agreed to sell to the said [*grantee*] a certain close, containing by admeasurement 10 acres or thereabouts, parcel of the said farm, and the inheritance thereof in fee simple, free from all incumbrances, at or for the price or sum of £——: AND WHEREAS in pursuance of the said agreement, and for the consideration aforesaid, by an indenture bearing even date with, but executed before the execution of these presents, and made between the said [*grantor*], of the one part, and the said [*grantee*], of the other part, the same close or parcel of land and hereditaments have been conveyed unto and to the use of the said [*grantee*], his heirs and assigns: AND

of agreement that grantee should have power of entry and distress on the other part of premises by way of indemnity.

WHEREAS, upon the treaty for the purchase aforesaid, it was agreed between the parties hereto, that the said [*grantee*], his heirs and assigns, should have such power of entry and distress upon the said messuage, and upon so much and such part of the said farm, and lands, called ———, as are not comprised in the said indenture of even date herewith, as is hereinafter contained, by way of indemnity against the payment of the said rent-charge.

Testatum.

NOW THIS INDENTURE WITNESSETH, that in further pursuance of the said agreement, and in consideration of the premises, the said [*grantor*] hereby covenants

Covenant that rent-charge shall be exclusively charged on other premises.

with the said [*grantee*], in manner following, that is to say; that the said yearly rent-charge of £——— shall henceforth be exclusively charged upon and issuing out of the farm and hereditaments mentioned in the schedule hereunder written, being so much of the said messuage, farm, and lands called ———, as is not comprised in the said indenture of even date herewith; AND FURTHER, that if, at any time or times hereafter, any distress, entry, claim, or demand shall be made or levied in or upon any part or parts of the lands and hereditaments comprised in the said indenture of even date for recovering payment of the said yearly rent-charge of £———,

X. Grant of Power of Distress by way of Indemnity.

or any part thereof, Then and in every such case it shall be lawful for the said [*grantee*], his heirs and assigns, to enter and distrain upon the hereditaments mentioned in the schedule hereunder written, or any part thereof; And the distress and distresses then and there made to take, impound, dispose of, or otherwise to act therein according to law, in the same manner as in cases of distress by landlords for rent reserved upon leases for years; To the intent, that, by the means aforesaid, the said [*grantee*], his heirs and assigns, may be fully paid and satisfied all and singular the sums and sum of money, costs, charges, damages, and expenses, which he or they shall or may have incurred or sustained by reason or in consequence of such distress, entry, claim, or demand as aforesaid, or any action or proceeding for recovering payment of the said yearly rent-charge of £———, or otherwise in relation thereto; and also the costs, charges, and expenses incident to or attending any distress or distresses made and levied under the authority of these presents. In witness, &c.

Power of distress.

The Schedule above referred to.

XI. *GRANT of a* Rent-Charge *in* Fee(*a*) *to* Trustees, *with Powers of Distress and Entry by Way of* Indemnity *against a Rent-Charge for the Benefit of* certain Purchasers; *with* Proviso *for the Cesser of the* Trusts. Power *of* appointing New Trustees.

THIS INDENTURE, made the ——— day of ———, Between [*grantor*], of &c., of the first part; [*purchaser*], of &c., of the second part; and [*grantees*], of &c., of the third part: Whereas (*recital of a will vesting lands in the grantor in fee, upon trust to be sold with the consent of cestui que trust*): And whereas (*recital of a conveyance of a mes-*

Parties.

Recitals: of will;

of conveyances to purchasers;

(*a*) A rent-charge is usually created by way of use, in the two following cases: *first*, where the land, subject to the rent, is limited by the same deed; and *secondly*, where, as in the present instance, it is intended that the grantor shall not be personally charged. As to the remedies for the recovery of annual sums charged on land, *vide ante*, Vol. I. p. 579, 2nd ed.

Mode of creating a rent-charge.

XI. Indemnity by Grant of Rent-charge by way of Use.

suage by the grantor to purchaser): And whereas the messuages and hereditaments respectively comprised in, and intended to be conveyed by the hereinbefore recited indenture, together with the messuage and hereditaments hereinafter particularly mentioned (being other part of the hereditaments devised by the above-recited will), are subject to a yearly rent-charge of £ ———: And whereas, previously to the completion of the aforesaid sale, it was agreed between the said [*grantor*] and the said [*purchaser*], that the said yearly rent should be charged on the messuage and hereditaments hereinafter described, with their appurtenances, exclusively and in exoneration of the messuages and hereditaments so sold to the said [*purchaser*], as aforesaid; and in order thereto, it has been agreed that a yearly rent-charge of £———, to be issuing and payable out of the messuage and hereditaments hereinafter described, with the usual powers of distress and entry for enforcing the payment thereof, shall be limited in use to the said [*grantees*], their heirs and assigns, upon and for the trusts, intents, and purposes hereinafter declared concerning the same. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the premises, the said [*grantor*], as beneficial owner, with the consent and at the request of the said [*purchaser*] (hereby testified), hereby grants and conveys unto the said [*grantees*] and their heirs, All that, &c. [*parcels*]; To hold the said messuage or tenement, hereditaments, and all and singular other the premises hereby granted and conveyed, with their appurtenances, unto the said [*grantees*], and their heirs, To the uses, upon the trusts, and for the intents and purposes hereinafter declared and contained of and concerning the same, that is to say; To the use and intent that the said [*grantees*], their heirs and assigns, may henceforth for ever hereafter receive the yearly rent-charge of £———, to be chargeable upon, and issuing out of the messuage and hereditaments hereby granted, by equal half-yearly payments, on the ——— day of ———, and the ——— day of ———, without any deduction, the first half-yearly payment of the said rent-charge, to be made on the ——— of ———, next ensuing: And [to this further use and intent, that, if any half-yearly payment of the said rent-charge of £ ———, or any part thereof, shall be unpaid by the space of fourteen days

of agreement for indemity.

Testatum. Grant of rent-charge.

To the intent that they may receive a rent-charge.

Power of distress by way of use.

next after any of the days of payment, whereon the same is hereinbefore appointed to be paid as aforesaid, then it shall be lawful for the said [*grantees*], their heirs and assigns, into and upon the messuage and hereditaments hereby granted and conveyed, or any part thereof, to enter and distrain for the same rent-charge of £———, and all arrears thereof; and the distress and distresses then and there found to take, impound, sell, or otherwise dispose of according to due course of law, in the same manner in all respects as landlords are authorized to do in regard to distresses for arrears of rent upon leases for years; To the intent that thereby and therewith the said [*grantees*], their heirs and assigns, shall and may be fully paid and satisfied the said annual sum or rent-charge of £———, and all arrears thereof, or so much thereof as shall be then remaining due and unpaid, and all costs, charges, and expenses whatsoever sustained or occasioned by the non-payment thereof (*b*): And as to the messuage and hereditaments hereby granted and conveyed], subject to and charged with the payment of the said rent-charge, and the remedies for the recovery thereof, To THE USE OF THE SAID [*grantors*], their heirs and assigns, upon the trusts, and for the intents and purposes, and under and subject to the powers, provisoes and declarations, upon, for, under and subject to which the same messuage and hereditaments were held by the said [*grantor*] immediately before the execution of these presents, by virtue of the hereinbefore in part recited will of the said [*testator*]. AND IT IS HEREBY AGREED AND DECLARED, That the said [*grantees*], their heirs and assigns, shall stand seised of, and interested in, the rent-charge of £——— hereinbefore limited as aforesaid, upon the trusts following, that is to say (after paying and satisfying and reimbursing themselves all costs, charges and expenses attending the execution of the trusts of these presents); UPON TRUST, and in order that the said rent-charge of £——— shall henceforth keep indemnified the several messuages, hereditaments and premises, with their appurtenances, so sold and conveyed to the said [*purchaser*],

XI. Indemnity by Grant of Rent-charge by way of Use.

Lands subject to rent to the use of the grantors upon trust.

Declaration of trusts as to rent.

Upon trust to indemnify purchaser.

(*b*) The insertion of powers of distress or entry being no longer necessary in a grant of a rent-charge the clause in brackets may be omitted, if desired; *vide ante*, Vol. I. p. 671.

XI. Indemnity by Grant of Rent-charge by way of Use.

as hereinbefore is mentioned; and also him the said [*purchaser*], his heirs, executors, administrators and assigns, estates and effects, from and against the said yearly rent of £———, and any other yearly rents to which the said messuages, hereditaments and premises so sold and conveyed to the said [*purchaser*], shall appear to be subject and liable, and all arrears and future payments thereof respectively, and all actions, causes of action, costs, damages, charges and expenses whatsoever, for or in respect of the same, or any part thereof respectively, or in anywise relating thereto: And it is hereby agreed and declared, That if, at any time or times hereafter, any claim or demand whatsoever in respect of the said yearly rent of £———, or any other yearly rents, or any of them, or any arrears or future payments thereof respectively, or any part or parts thereof respectively, shall be made upon the several messuages, hereditaments and premises so sold and conveyed to the said [*purchaser*], as hereinbefore is mentioned, or any of them, or any part thereof respectively, or upon the said [*purchaser*], his heirs, executors, administrators, or assigns, or the tenants or occupiers, or tenant or occupier, for the time being of the same messuages or tenements, hereditaments and premises, or any of them, or any other person or persons who shall or may have or be entitled to any estate or interest in the same premises, or any part thereof, his, her, or their heirs, executors, or administrators; and the said [*purchaser*], his heirs, executors, administrators, or assigns, or any such other person or persons as aforesaid, shall, by reason of any such claim or demand, or any act, deed, matter, or thing relating thereto, pay any sum or sums of money, or incur or sustain any costs, charges, damages, or expenses whatsoever, Then, and in any such case, the said [*grantees*], or the survivor of them, or the heirs of such survivor, or their or his assigns, shall, with and out of the said yearly rent-charge of £———, and any arrears thereof which shall be then due, levy and raise, and pay, discharge, and satisfy, unto the person or persons who shall have so paid such sum or sums of money, or incurred or sustained such costs, charges, damages, or expenses as aforesaid, or his, her, or their executors or administrators, all the said sum or sums of money, costs, charges, damages, or expenses which shall have been so paid, or incurred, or sustained as aforesaid: And also shall, with and out of the

In case of their being called upon to pay the rent originally charged,

then in trust to raise and satisfy the same, and all expenses.

same, levy and raise, and retain to themselves or himself, all their or his costs or expenses to be incurred in or about the execution of the aforesaid trusts. PROVIDED ALWAYS, and it is hereby agreed and declared, That, subject and without prejudice to the trusts hereinbefore declared of the said rent-charge of £———, the said [*grantees*], their heirs or assigns, shall permit the messuage or tenement and other hereditaments hereby conveyed, to be held and enjoyed, and the rents and profits thereof to be received and taken by the said [*grantor*], his heirs and assigns, in such manner as if the same messuage or tenement, hereditaments and premises were not subject to or were discharged from the said rent-charge of £———. PROVIDED ALSO, and it is hereby further agreed and declared, that, in case at any time hereafter the owner or owners of the messuage or tenement and other hereditaments hereby conveyed, shall, at his, her, or their proper costs and charges, procure the several messuages or tenements, hereditaments and premises, so sold and conveyed to the said [*purchaser*], as hereinbefore mentioned, to be effectually released from the said yearly rent of £———, and all arrears thereof, and if it shall at any time hereafter be ascertained that no other yearly rent or rents is or are charged or chargeable upon the same messuages or tenements, hereditaments and premises, or any of them, Or in case, by any other means, the said yearly rent of £———, and all other yearly rents, if any, which are now charged thereon, shall cease to be payable out of, or charged or chargeable upon the same messuages or tenements, hereditaments and premises, or any of them, and all moneys, if any, which shall then have become raisable under the trusts aforesaid, shall be fully paid and discharged, Or in case the trusts hereinbefore declared concerning the said rent-charge of £——— shall otherwise be fully satisfied, or become unnecessary, or incapable of taking effect, Then, and in such case, and immediately thereupon, the said rent-charge of £———, and all powers and remedies for enforcing the payment thereof, shall cease and determine. IN WITNESS, &c.

XI. Indemnity by Grant of Rent-charge by way of Use.

Grantors to enjoy, subject to the trusts for indemnity.

Proviso for cesser.

XII. *DEMISE of* FREEHOLDS *to a* TRUSTEE, *in Trust to* INDEMNIFY *the* PURCHASER *of* OTHER FREEHOLDS *against the* LOSS *of* TITLE DEEDS.

THIS INDENTURE, made the ——— day of ———,

Parties. BETWEEN [*vendor*], of &c., of the first part; [*purchaser*], of &c., of the second part; and [*trustee*], of &c., of the third part:

Recitals: of conveyance and deduction of title; WHEREAS (*recite purchase and conveyance to purchaser in fee*): AND WHEREAS the said [*vendor*] has deduced his title to the said messuage and hereditaments from [J. P.] and [R. P.], deceased:

of loss of deeds, and agreement for indemnity; AND WHEREAS certain of the deeds and writings relating to and showing the title of the said [J. P.] and [R. P.] to the said messuage and hereditaments cannot be found, and it has been agreed, that the said [*vendor*] shall demise unto the said [*trustee*], his executors, administrators, and assigns, the hereditaments hereinafter demised, upon such trusts, by way of indemnity, as are hereinafter contained (which hereditaments were conveyed unto and to the use of the said [*vendor*], his heirs and assigns, by indenture, dated the ——— day of ———, and expressed to be made between &c.).

title to hereditaments demised.

Testatum. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the premises, he the said [*vendor*], as beneficial owner,

Demise. hereby demises unto the said [*trustee*], his executors, administrators, and assigns, ALL [*parcels*],

Habendum for 1,000 years; TO HOLD the said hereditaments and premises unto the said [*trustee*], his executors, administrators, and assigns, henceforth, for the term of one thousand years from the day of the date of these presents, without impeachment of waste,

in trust, to indemnify purchaser. in trust for the said [*vendor*], his heirs and assigns, until the said [*purchaser*], his heirs or assigns, shall be prejudiced or interrupted in the quiet enjoyment of the messuage and hereditaments so sold and conveyed to him and them as aforesaid, by reason or on account of the said deeds or writings, showing the title of the said [J. P.] and [R. P.], being lost or mislaid, or of the want or defect of title in the said [*vendor*] to the messuage and hereditaments so sold and conveyed by him as aforesaid; And after the said [*purchaser*], his heirs or assigns, shall be so prejudiced or injured, Then upon trust, that the said [*trustee*], his executors, administrators, or assigns, shall, from time to time, by and

XII. Indemnity by Demise against Loss of Title Deeds.

out of the rents and profits of the hereditaments hereby demised, or by mortgage or sale thereof, or of a competent part thereof, for all or any part of the said term, or by bringing actions against any of the tenants or occupiers of the said premises, for the recovery of the rents then in arrear, or by making entries upon the said premises or any part thereof, or by all or any of the means aforesaid, or any other means whatsoever, levy and raise all such sum and sums of money, costs, charges, damages, and expenses, as he the said [*purchaser*], his heirs, executors, administrators, or assigns, shall pay or sustain, or which to him or them, or any of them, shall be occasioned by reason or on account of the said deeds or writings being lost or mislaid, or the want or defect of title in the said [*vendor*], to the messuage and hereditaments so sold and conveyed by him to the said [*purchaser*], his heirs and assigns, as aforesaid, and to pay all the residue or surplus of the money to arise by any such mortgage or sale, and which shall remain after answering the purposes aforesaid, unto the said [*vendor*], his heirs and assigns, for his and their use and benefit: PROVIDED ALWAYS, that if the said [*vendor*], his heirs, executors, or administrators, shall, at any time within the space of six years, to be computed from the day of the date of these presents, produce and deliver to the said [*purchaser*], his heirs or assigns, the deed or deeds, or writing or writings, under which the said [J. P.] and [R. P.], deceased, claimed or derived a good title to the messuage and hereditaments so conveyed to the said [*purchaser*], his heirs and assigns; OR in case the said [*purchaser*], his heirs and assigns, shall not, during the said space of six years, be interrupted or disturbed in the free and quiet enjoyment of the messuage and hereditaments so purchased by him as aforesaid, by any person or persons lawfully claiming or to claim any right or title thereto, by, from, or under the said [*vendor*], or any of his ancestors, or any person or persons under or through whom he or they claimed; OR in case he the said [*purchaser*], his heirs or assigns, being in anywise injured by reason or means of the loss of the said deeds, or the want of title in the said [*vendor*] to the messuage and hereditaments so sold by him as aforesaid, the said [*vendor*], his heirs, executors, and administrators, shall satisfy and pay unto the said [*purchaser*], his heirs and assigns, all such loss or damage as he or they shall so suffer or sustain

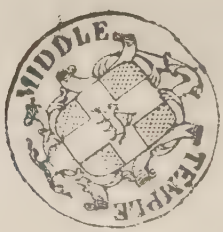
Proviso for cesser of term if deeds delivered, or no damage sustained within six years, or if sustained made good.

XII. Indemnity by Demise against Loss of Title Deeds.

therein during the said space of six years, Then, and in any of the said cases, the term of one thousand years hereby created shall absolutely cease and determine. And the said [*vendor*] hereby covenants with the said [*purchaser*], that he the said [*vendor*], his heirs, executors, and administrators, or some or one of them, will, from time to time and at all times hereafter, during the space of six years from the day of the date of these presents, sufficiently keep indemnified the said [*purchaser*], his heirs, executors, administrators, and assigns, and the messuage and hereditaments so purchased by him as aforesaid, and all other his messuages, lands, tenements, hereditaments, goods, chattels, personal estate, and effects, from and against all loss, costs, charges, damages, and expenses, which he, they, or any of them shall bear, pay, suffer, sustain, expend, disburse, be at, or put unto, for or by reason or means of the said deeds being lost or mislaid, or for the want or defect of title in the said [*vendor*] to the messuage and hereditaments so sold and conveyed by him to the said [*purchaser*], his heirs and assigns, as aforesaid: Provided, lastly, that the power of appointing new trustees of these presents in the place of the said [*trustee*], or of any trustees hereafter to be appointed in his place, shall be exerciseable by the said [*purchaser*], his heirs or assigns. In witness, &c.

Covenant by vendor to indemnify.

Power of appointing new trustees.



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